UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Civil Action
No. 82-1672-S

SKINNER, D. J.
and a Jury

ANNE ANDERSON, ET AL

V.

W. R. GRACE & CO., ET AL

Seventy-Eighth Day of Trial

APPEARANCES:

Schlichtmann, Conway & Crowley (by Jan Richard Schlichtmann, Esq., Kevin P. Conway, Esq., and William J. Crowley, III, Esq.) on behalf of the Plaintiffs.

Charles R. Nesson, Esquire, on behalf of the Plaintiffs.

Herlihy & O'Brien (by Thomas M. Kiley, Esq.) on behalf of the Plaintiffs.

Hale & Dorr (by Jerome P. Facher, Esq., Neil Jacobs, Esq., Donald R. Frederico, Esq., and Deborah P. Fawcett, Esq.) on behalf of Beatrice Foods.

Foley, Hoag & Eliot (by Michael B. Keating, Esq., Sandra Lynch, Esq., William Cheeseman, Esq., and Marc K. Temin, Esq.) on behalf of W. R. Grace & Co.

Courtroom No. 6
Federal Building
Boston, MA 02109
9:00 a.m., Tuesday
July 15, 1986

Marie L. Cloonan
Court Reporter
1690 U.S.P.O. & Courthouse
Boston, MA 02109

(In the absence of the jury.)

THE COURT: I am just coming in to say I have Beatrice Foods' second requests for instructions. I probably will not change in any substantial degree the form of the instructions that I've submitted to you. All these issues have been discussed to a farethewell.

MR. TEMIN: Your Honor, for the record, may I suggest with respect to Beatrice that we also request and endorse proposals 2, 3, 7, 8, 9 up to the last sentence and 12. Thank you.

THE COURT: All right. I'm going to go out again and come in with the jury.

(Jury enters the courtroom.)

THE COURT: I forgot to ask counsel if there was any change in the application of the rule relating to jurors.

(No response.)

THE COURT: All right.

Members of the jury, I'm going to ask that you not take notes at this stage. What I'm going to say to you is going to be fairly complex. It's more likely than otherwise that your notes are going to end up confusing you rather than helping you, and I'd rather have you focus on what I'm saying as I go along. I think you'll end up -- I hope you'll end up with a better understanding.

Now, I'm going to ask Mr. Lyons to distribute to you the two sets of interrogatories, special interrogatories that I'm going to ask you to answer. You're all going to get a copy of them. Only one should be filled out, the foreman's, so I will end up taking back those that are used by the alternate jurors before I excuse you, and when the deliberations are over I expect to get one filled out form and five blanks.

(Documents handed to the jurors by the clerk.)

THE COURT: Now, you should have two sets of interrogatories. One refers to Beatrice and one refers to W. R. Grace. They are quite comparable.

Now, the courtroom will be closed during these instructions so any of you who do not intend to stay in the courtroom through the complete instructions make your escape now.

Members of the jury, we have now reached the point in the trial where, as I said to you at the outset, I will attempt to instruct you as to the rules of law which will govern your answers to questions which have been submitted to you. As I explained earlier, we are taking this case in stages, and so it is impossible at this point to ask you for general verdicts; and instead we are asking you to return answers to specific questions which deal with the issues raised in this first stage.

In the argument yesterday, counsel, one counsel said that what his client is looking for is justice. This is a fine phrase, one that we all admire. It's a difficult one to deal with. Justice is an abstract idea, and each individual has a different perception of what it may be. And we have some general ideas about it. In our society, at least, it includes a trial, right to a trial, impartial judgment and so on.

end A

When you come down to specifics, it gets more and more difficult. And while it may sometimes be possible to arrive at some idea of justice from the point of view of one party, when you take into account that all of the parties in the case are entitled to justice, why, then, it gets to be a very complicated and difficult problem.

Our system has worked out a form of approximating justice, I suppose is the best you can say, for the trial. Among other things, it means the trier, Judge or juror, is not free to impose his own personal sense of what is justice. It is not open to express one's own idiosyncrati views about the world in a verdict or a judgment. The idea being there be some standardization, some predictability in the judgments of the Courts, and so it is the philosophy of our trial system that justice is best approximated by a careful consideration of reliable evidence and by the applications to that evidence of rules of general applicability, criteria of general applicability that apply to everyone.

What I am going to try to do this morning is talk a little bit about those general rules and general criteria.

At the outset, it would perhaps be helpful for me to explain to you the role of the Judge and the jury at this and every other trial.

It is for the jury to assess the evidence

and evaluate the evidence and make findings of fact, and that is generally stated to be the exclusive province of the jury.

The Judge is charged with identifying and explaining and imposing the appropriate rules of law which govern the decision in the case.

There are certain points in the trial of a case in which the respective roles of Judge and jury intersect. While I have said that the jury is the exclusive finder of fact and evaluator of the evidence in the case, the Judge has the obligation to determine whether the evidence on particular issues in the case rises to the minimum legal level which permits a finding of fact by the jury.

As you recall, some weeks ago there were some two or three days in which you were excused and the lawyers and I worked together on precisely that type of issue, and I told you that I would tell you the results of our work when it came time for the instructions. I have made a number of rulings which have narrowed the scope of the case in several respects.

By making those rulings, I don't mean to convey to you any judgment about the aspects of the case which remain before you. You make the evaluation of that testimony. I have only ruled -- rather, my ruling only imports that a minimum level, the minimum legal level has been

reached, and it is for you to determine the worth of the credibility and the effect of the evidence which is before you.

You will recall that at the outset I explained to you, as did counsel, that Plaintiffs were proceeding on three theories of liability: negligence, nuisance, and so-called strict liability.

As a matter of law, I have now withdrawn from your consideration the issue of strict liability as to both Defendants. This is in part because this issue is by law an issue for the Court and not for the jury. I have also concluded that at least from the context of this case the claim for damages for the maintenance of a nuisance is not an independnent claim but an aspect of liability for negligent conduct, as I will try to explain later on.

Negligence, as the term is used in lawsuits for personal injury, does not mean generalized carelessness. It means a failure to fulfill a particular duty to the Plaintiffs in the case. The duty is a duty to exercise reasonable care for the safety of the Plaintiffs or to prevent an unreasonable risk of harm to the Plaintiffs. The Defendants do not owe such a duty to the Plaintiffs unless the Plaintiffs belong to a class of persons as to which there was a reasonably foreseeable risk of harm which is likely to result from the Defendants' conduct. This

rule of law has led me to another limitation in the scope of this case having to do with time.

There can be no reasonably foreseeable risk of harm by reason of the contamination of drinking water unless there exists a group of people likely to drink the water involved.

With respect to the water in the Aberjona aquifer, no such group of people existed until Well G became operable on October 1st, 1964. Consequently, there was no group of people as to whom the Defendants owed a duty to use reasonable care with respect to the water until that date.

As you see by reference to the first question relating to W. R. Grace, all of your answers will relate to the period of time between October 1964 when the wells opened and May 22, 1979 when the wells closed.

You will notice there is a different date in the first question relating to Beatrice Foods. That, again, is the result of a ruling by me narrowing the scope of the case as to Beatrice Foods.

Foreseeability of harm is one of the aspects of the case about which you must make a determination, as I will discuss with you in a few minutes, but, again, I must rule concerning the minimum level of evidence sufficient to warrant a decision by you on this issue. With respect to Beatrice Foods, I have ruled that prior to the receipt by the Riley Company on August 27, 1968 of a letter from Mr. Maher to the effect that the water table on the Riley property had been lowered in part by the pumping of Wells G and H, there was no legally sufficient evidence that a reasonable person would foresee that conduct on the Riley property would affect Wells G and H. Now, it is for you to determine whether it was reasonably foreseeable after that.

I should also discuss the role of the attorneys. We operate under an adversary system where we hope that some approximation of the truth will emerge through the competing presentation of adverse parties. I say approximation

of the truth advisedly. I don't think that there is any expectation that we're ever going to arrive in these matters at absolute truth or cosmic truth, simply because we are operating within the human condition.

It is the role of the attorneys to press as hard as they legitimately can for their clients' positions. In fulfilling their role, they have not only the right but the obligation to make objections to the introduction of evidence, and while the interruption caused by these objections may be irritating, the attorneys are not to be faulted because they have a duty to make objections if they feel they are appropriate. The application of the rules of evidence is not always clear and lawyers often disagree. It is my job as the judge to resolve these disputes because some decision must be made in order for the trial to proceed. It is important for you to realize, however, that my rulings on evidentiary matters have nothing to do with the merits of the case and are not to be considered as points scored for one side or the other.

Similarly, one cannot help becoming involved with the personalities and styles of the attorneys in a trial that has lasted as long as this one has, but it is important for you as jurors to recognize that this is not a gladiatorial contest among attorneys but an attempt to resolve the merits of the controversy among the parties

rationally, on the basis of the evidence. As I have said earlier, statements by the attorneys and characterizations by them of the evidence are not controlling. Insofar as you find them helpful, take advantage of them, but it is your memory and your evaluation of the evidence in the case which counts.

As we proceed through these instructions, I may make reference to some aspect of the evidence to focus your attention on the issues in the case. You should not try to infer from any comment I make about the evidence or from any ruling that I have made concerning what issues should go to the jury that I have made any conclusion as to what the answers should be to these questions which have been presented to you. I do not intend to convey to you any such conclusion, and if I inadvertently leave you with the impression that I have an opinion about a question of fact, you must disregard it. The evaluation of the evidence is none of my business. It is your province entirely.

Up to this point, you have been permitted to take notes, but I've asked you not to do that this morning. Some of you have taken a great many more notes than others. Please remember that notes are aids to memory, not substitutes for memory. One person's memory may be better than another's notes. Perhaps notes are superbly accurate. Perhaps not. Make your own judgment about it. Don't surrender your own

views of the case simply because one of your number has contrary notes. You should consider whether his or her notes may be better than your memory, or not as good, but you should not simply surrender or be intimidated because his or her impressions are in writing and yours are not.

The first general proposition that I want to talk to you about before we talk about these special interrogatories is the burden of proof. The burden is on the plaintiffs in a civil action such as this to prove every essential element of their claim by a preponderance of the evidence. The issue is drawn by plaintiffs' assertion of the defendants' wrongdoing and the defendants' denial. Defendants are entitled to require that plaintiffs prove their case by a preponderance of the evidence. If the proof should fail to establish any essential element of the plaintiffs' claim by a preponderance of the evidence in the case, the jury should find for the defendant. To establish a proposition by a preponderance of the evidence, the plaintiffs must prove that the proposition is more likely so than not so. In other words, a preponderance of the evidence in the case means such evidence as when considered and compared with that opposed to it has more convincing force and produces in your minds belief that what is sought to be proved is more likely true than not true. I shall be referring to preponderance of the evidence again and

again in this case, and you should have this definition in your mind. I shall read it to you again. A preponderance of the evidence in the case means such evidence as when considered and compared with that opposing it has more convincing force and produces in your minds the belief that what is sought to be proved is more likely true than not true.

We are not concerned with proof to a mathematical or to a scientific certainty or proof beyond a reasonable doubt, which is the standard of proof in criminal cases, but proof by a preponderance of the evidence as I have just defined it for you.

All of the testimony in the case, other than testimony which has been stricken, may be considered by you in assessing whether the plaintiffs have met their standard of proof, along with all of the exhibits of every sort: Documents, photographs, materials and including the appearance of the sites as viewed by you. Included in the evidence which you will have with you in the jury room will be certain graphic representations which you have seen during the trial. After the view, I met with counsel to determine which of these graphic representations should be considered exhibits in evidence and which should not. The distinction in a general way is that a graphic representation is entitled to be treated as an exhibit if it is a

compilation of data otherwise substantiated. Graphic representations which illustrate opinions or theories are not exhibits. In any case, you should remember that these graphic representations are designed to illustrate a point, not necessarily to be pictures of the real world. The more expertly executed they are, the more danger there is of missing this distinction. Graphics which are not exhibits are called chalks and have been properly used by counsel to assist them in their presentation and arguments.

Of course, there is some overlap as to the distinction. There's no bright line but, again, some distinction, some decision has to be made, and it's up to me to make it, and I have.

Opinions of expert witnesses are matters of evidence, and you may use them in arriving at your conclusions, depending on your assessment of their reliability and persuasiveness. I shall discuss expert testimony again later on.

Most of the important issues in this case depend upon your assessment of what is referred to as circumstantial evidence. There is very little direct evidence of the movement of water or the movement of contaminating chemicals beneath the ground. You are asked to draw conclusions, as the experts in the case have drawn conclusions, by making inferences from certain established

facts.

Now, the following is a more or less standard instruction concerning the difference between direct and circumstantial evidence. Direct evidence of a phenomenon or event consists of the testimony of every witness who with any of his own physical senses perceives such phenomenon or event or any part thereof and which testimony describes or relates what thus was perceived. The witness comes in and says, "I saw something happen. I saw a measurement, I heard something, I smelled something, I touched something, and I tasted something." And he tells you about it or she tells you about it. Direct evidence may also consist of physical exhibits or documents which you yourself perceive with your physical senses.

Circumstantial evidence is evidence which does not of itself establish a fact in issue but which establishes facts from which the existence of an ultimate fact may reasonably be inferred. For instance, the measurement of water levels at various test wells is direct evidence of the level of the water. It may be circumstantial evidence of the direction in which the water flows.

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The direction in which the water flows may be inferred from the data directly perceived in the well. Photographs, and your view of the sites, are direct evidence of the conditions at the time of the photograph or view, from which you have been asked to draw inferences about conditions existing before May 22nd, 1979. For instance, there is direct evidence of presence of the complaint chemicals in Wells G and H after May 22nd, 1979, but no direct evidence of their presence before that date. Plaintiffs ask you to infer that such pollution existed from all of the circumstances of the case, that is pollution prior to May 22nd, 1979, that is by circumstantial evidence.

The law makes no distinction between direct and circumstantial evidence. Circumstantial and direct evidence may be given equal weight. Circumstantial evidence is sometimes referred to as if it were of less value than direct evidence. You sometimes hear a reference to mere circumstantial evidence. In some cases, however, it may be even more convincing than direct evidence, because direct evidence may depend upon the fallible memory, observation, and truthfulness of one witness, while circumstantial evidence may be supported by logical inferences drawn from a chain of firmly established circumstances.

The essential question is whether the evidence taken as a whole, both direct and circumstantial,

establishes every element of the Plaintiffs' case by a preponderance of the evidence. Nothing that I have said should be taken by you as permission to indulge in speculation, conjecture, or guesswork. If circumstantial evidence is to form a basis for your answers to these questions, the evidence establishing each underlying fact must be strong enough to satisfy the burden of proof, and the inferences which you draw from these facts must satisfy rigorous standards of logic, common sense, and common experience.

And it is the last sentence that I just read to you which distinguishes a proper inference from speculation, guesswork, or unsupported assumptions.

In reaching your answers to these special interrogatories, you will be called upon to resolve conflicts in the testimony of some of the witnesses who have come before you. You will be required to make an assessment about the comparative reliability of the various witnesses. In asking you to do this, I am not asking you to do anything that you don't do in your ordinary lives. In the course of your lives you have developed skills and instincts for making this very kind of determination, at home, in your business, in politics, and in your community, and it is for this reason that you have been called to sit as jurors in this case. You consider the opportunity of the witness to observe and his apparent capacity to remember accurately and to relate

accurately what he has observed. You look to the internal consistency of the testimony, you watch the facial expression, listen to the tone of voice, and pay attention to the body English which accompanies the testimony. You may not realize consciously that you are responding to these clues, but you do so instinctively on the basis of your experience. As jurors, you are entitled to rely on these instincts.

In resolving conflicts between, or among in this case, expert witnesses, the problem becomes more difficult. It is more difficut to relate the substance of what they're describing to our own common sense and experience. In fact, the reason that experts are permitted to give opinions in Court is because they have or claim to have special knowledge and experience concerning matters beyond the reach of ordinary laymen.

Nevertheless, there is nothing magic about experts or about their testimony. They should be evaluated according to the same standards of reliability, common sense, and to the extent possible, common experience, as is the testimony of other witnesses. You should consider the expert's education and experience, the extent to which he has dealt with similar problems previously, the care and preparation that he has given to the support of his opinion, and his familiarity with the underlying facts.

The cross-examination of experts is extremely

critical. Experts typically sound extremely convincing in the course of direct examination. The lawyer has his yellow sheet of questions, the answers go, the answers go, but cross-examination is the test. Among the clues that you can consider are the expert's ability to answer unexpected questions, his openness and willingness to answer questions, and the extent to which his various answers reveal a comprehensive understanding of the problem about which he has testified. If you find the expert witness to have been unreliable or untruthfull in some aspect of his testimony, you may consider whether that creates doubt about some other part of the testimony. On the other hand you may find the witness to be reliable and credible in some respects even though you reject his testimony or find him unreliable in other respects. All of theses assessments and determinations are wholly within your province as jurors. If expert witnesses are in direct conflict, you may reject one and accept the other, or you may reject them both, which may leave no evidence on the subject. Of course, if they are in direct conflict, you can't accept them both.

During the questioning of the experts, you may recall that there was some shifting between questions which asked if such and such were possible and questions which asked what the probability was that such and such was true. While it may be appropriate in testing an expert witness on cross-examination to ask questions about possibilities, what you as jurors are concerned with are reasonable scientific probabilities. Proof by the preponderance of the evidence is not established by mere possibilities.

You are not entirely without tools to assess even the specialized expert testimony in this case. There are some principles concerning which the experts have agreed, one of which is the law of conservation of mass, which in

terms of this case means that all the water found to be coming into the aquifer must be accounted for because it did not disappear. One of the bases for testing the expert's opinion, at least as to water flow, is the extent to which the expert has accounted for all of the water. This comes up in cross-examination with all of them, and it is for you to determine whether the expert has given a satisfactory answer.

These issues were reviewed by several counsel yesterday, and I'm sure you remember them because they were among the major questions which engaged our attention during the examination of witnesses.

Another accepted principle is that water runs from a high head to a lower one. These gradients result from a number of factors, including topography and pressure differentials. The only problem that you run into, I suppose, if you draw a line from A to B and decide that A is higher than B, you have to be careful that C isn't in between them which is higher than both, and that leads to a different answer. You are free to take the numbers which are in evidence and make calculations of your own, if you choose to do so, but I advise very great caution. It is plainly apparent from the evidence that failure to take into account one or another critical numbers, even a small one, can produce major distortions. If you elect to try to

deal with some of these numbers yourself, all I can say to you is please be careful. In the long run, it may be sounder for you to try to assess the reliability of the experts that we have heard, rather than to try to become experts yourselves.

I now ask you to turn to the questions. You notice that there are two sets, one having to do with Beatrice Foods and one having to do with W.R. Grace. They are generally parallel, but there are several differences. With respect to Grace, the starting point of the relevant periods is October 1, 1964, and with respect to Beatrice Foods it is August 27th, 1968, and that is as a result of the rulings which I had made previously and which I described to you earlier. The October 1, '64 date being the first time there was a class of persons as to whom the Plaintiffs arguably may have owed a duty of due care, and August 27th, 1968, is the first time at which it arguably may have been foreseeable that condition on the Riley property would affect Wells G and H.

Also, the special interrogatories as to Beatrice Foods deal with four chemicals and as to Grace three chemicals. My earlier rulings have eliminated chloroform and benzene from the case, and I have eliminated 1,1,1 trichloroethane from the case against Grace on the basis of Dr. Pinder's testimony.

Question one, have the Plaintiffs established by a preponderance of the evidence that any of the following chemicals were disposed of at the Grace or Beatrice site after the critical date and substantially contributed to the contamination of Wells G and H by these chemicals prior to May 22nd, 1979? In order to return an answer of "Yes" with respect to any of the chemicals listed, you have to be satisfied on the basis of a preponderance of evidence as to both of the elements contained in question one, namely, that the chemicals were disposed of at the particular site after the date specified and substantially contributed to the contamination of Wells G and H prior to May 22nd, 1979. Of course, to contribute to the contamination of the wells prior to May 22nd, 1979, of course, they would have to have been disposed on the site prior to that time as well. So you are dealing with a disposition of or the presence of complaint chemicals on the respective sites between the starting dates listed in question one and May 22nd, 1979.

This is an appropriate time to discuss what I mean by "substantially contributed to the contamination of Wells G and H." It is not the Plaintiffs' obligation to prove that either of these Defendants was soley responsible for the contamination of Wells G and H, nor is it the Plaintiff's responsiblity to prove that the two of them together was solely responsible for the contamination of

Wells G and H.

There is evidence in the case of a number of sources from which these chemicals might have traveled to Wells G and H. It is not the Plaintiffs' burden to exclude these sources as possible contaminants of the two wells. It is the Plaintiffs' burden to establish by a preponderance of the evidence with respect to each Defendant that the chemicals traveled from each Defendant's property and reached G and H in sufficient quantity to be an operative and potent factor in bringing about the contamination of those wells before they were closed on May 22nd, 1979.

I am going to read that over again. I don't pretend to you that this is easy.

I don't pretend to you that this is easy. It's not. There is evidence in the case of a number of sources from which these chemicals might have traveled to Wells G and H. It is not the plaintiffs' burden to exclude these sources as possible contaminants of these wells. It is the plaintiffs' burden to establish by a preponderance of the evidence with respect to each defendant that the chemicals traveled from each defendant's property and reached Wells G and H in sufficient quantity to be an operative and potent factor in bringing about the contamination of those wells before they were closed on May 22, 1979. And you have to make that determination in consideration of all of the evidence in the case. If you are not satisfied by a preponderance of the evidence that the level of contamination at Wells G and H was significantly raised by reason of the contribution of contaminants from the properties of these defendants, then you would not be warranted in answering "Yes" in Question 1.

Now, while I have said the questions relating to Grace and the questions relating to Beatrice are parallel in some respects, each set of questions must be considered separately because the evidentiary factors affecting your answers are completely different. The answers need not be the same for both defendants.

One other point. The Beatrice site does

not include the property of the City of Woburn extending along part of the City sewer to a width of 20 feet on either side of the center line of the sewer. And there is a deed in evidence somewhere which gives you the bounds of the City's property. That's the City's property; it isn't Beatrice's property.

With respect to Beatrice, the first part of Question 1, whether the chemicals were, in fact, disposed of at the Beatrice site after August 27, 1968 and prior to May 22, 1979, raises a direct conflict in the testimony of expert witnesses. In this case, the conflict is even more curious because the experts are not even from the same discipline. The only evidence supporting the conclusion that the chemicals were disposed of at the Beatrice site after August 27, 1968 and prior to May 22, 1979 is the opinion testimony of Mr. Drobinski, a geologist who has become an environmental specialist. His testimony is based upon his evaluation of photographs, the appearance of the site, including the dating of various artifacts found among the debris. He draws the inference as an expert that not only were these artifacts placed upon the ground during the period I have mentioned but that the chemicals listed were introduced to the soil and the groundwater over the same period of time. With respect to the Beatrice site, there is no evidence of quantity of chemicals which produced the

concentrations reported.

And this makes evaluation of this testimony more difficult because, as we learned in some later testimony, concentrations in parts per billion can mean either very small or very large quantities of material, depending upon the larger body of material in which the concentrations are found. If you're looking at concentrations per billion in a teacup, you have pretty minor amounts. If you were looking at concentrations in a 55-gallon barrel or drum, you get a different amount. And if you're thinking of vast areas of ground and quantities of water, you're coming up with yet a different amount. And we don't know what the general volumes of material were to which these concentrations are to be applied, so that it becomes more difficult to make a judgment about whether this was one load of TCE or three or five over what period and in what quantities. You have the opinion of Mr. Drobinski and you have your own exposure to some of the underlying facts, and you have to make the best judgment you can on the evidence that's before you.

You may initially evaluate this testimony standing alone and make a determination as to its reliability. If you do not find it sufficiently reliable to establish this proposition by a preponderance of the evidence, you should answer "No" to these questions. If you do find it sufficiently reliable standing alone, then you should

evaluate it further in the light of the contrary testimony of Dr. Braids, who is a soil chemist. You recall that he testified that by reason of the activity of microorganisms in the ground, some amount of these chemicals would have been converted to vinyl chloride within 3 to 6 years of their placement in the ground. He found no vinyl chloride except in one or two places, and that in small amounts, from which he concluded that these chemicals had been on the property for no more than six years at the time he examined them in the fall of 1985. That is, he concluded that the chemicals were not there prior to May 22, 1979. He's the one who really testified about that, and it's a question whether you accept that or don't. That's up to you. Ms. Sacco, if you recall the lady from the lab, testified concerning the breakdown of these chemicals and testified as to the sequence in the same way that Dr. Braids did, but she offered no opinion as to the amount of time it would take.

I give these little thumbnail summaries of the evidence merely to focus for you what the issue is with regard to the first part of the question as it relates to Beatrice. These are not intended to be accurate or complete renditions of the experts' testimony, and it is your memory, assessment and characterization of this testimony that counts, not mine. It is interesting to note, however,

that neither of these witnesses had ever dated the occurrence of pollution before. They both did it for the first time in the context of this litigation.

If you are not satisfied by a preponderance of the evidence that any of the chemicals was disposed of at the Beatrice site after August 27, 1968 and prior to May 22, 1979, then you will answer "No" with respect to those chemicals. If you are satisfied as to that point, then you move to the second part of the question as to whether these chemicals contributed to the contamination of Wells G and H prior to May 22, 1979.

Now, I refer you back to the arguments yesterday in which counsel made various points in support of each proposition, and I won't review those.

We get next to the point of whether the chemicals contributed to the contamination of Wells G and H. At this point, I don't think it is extreme for me to say that we hit evidentiary chaos. We have not only two but three expert witnesses giving three separate and contradictory opinions. Dr. Pinder says that during the pumping of Wells G and H water flowed from the Beatrice site under the river to the wells and carried with it the contaminants. Mr. Koch says that the river was a barrier and actually during the pumping of the wells water from the westerly side of the river flowed in a westerly direction away from the

wells. Dr. Guswa said that the gradients on the Beatrice site were so insignificant that he can't say one way or the other.

These three versions of the action of the water during pumping illustrate very nicely the operation of the rule concerning burden of proof. If you accept Dr. Pinder's testimony, you answer "Yes." If you accept Mr. Koch's testimony, you answer "No." If you accept Dr. Guswa's testimony, you answer "No," because the proposition has not been established by a preponderance of the evidence.

Now, you're not required to take any of these people whole. You can take parts of one and parts of the other if you think that's where the truth lies. That's a difficult array of testimony to deal with. Again, you would apply your common sense, your common experience, your good judgment in the assessment of that testimony.

With respect to W. R. Grace Company, Question No. 1 is less complex. There is dispute only with respect to minor items as to the disposition as to the complaint chemicals at the Grace site after October 1, 1964 and prior to May 22, 1979. There is some question as to the date at which tetrachloroethylene was first used at Grace, but even that dispute is within the span of these two dates. Further, the second part of the question does

not depend upon the resolution of a dispute about the direction of waterflow, because all of the experts agree that the water flows in an arc westerly and southerly from the Grace property down to Wells G and H. The conflict concerns only the speed at which the complaint chemicals would travel in the subsoil along the route which the water travels. This conflict is exemplified by testimony of Dr. Pinder on the one hand and Dr. Guswa on the other, and it is for you to apply the criteria that I have suggested in determining whether the plaintiffs have established the propositions described in Question 1 by a preponderance of the evidence. If you are satisfied that they have, answer "Yes." If you are not so satisfied, you answer "No."

The Pinder and Guswa testimony was reviewed yesterday, and I'm certainly not going to add anything to that.

If you have answered "No" to all of these subsections of Question 1 with respect to either defendant, you need not proceed further with respect to that defendant. If you have answered "Yes" as to any of the subsections of Question 1 with respect to either defendant, you must then proceed to Question 2.

Question 2 with respect to each defendant asks for you to determine what, according to the preponderance of the evidence, was the earliest time that each chemical as

to which you answered yes in Question 1 made a substantial contribution to Wells G and H. To answer this question, you must determine when the chemicals were disposed of and what the travel time was.

With respect to travel time from the Beatrice site, the only evidence is in Dr. Pinder's testimony. Beatrice has offered no testimony on the point because it is its position that the chemicals did not travel to Wells G and H at all. The dispute concerning travel time from the Grace site I have referred to previously; that is, the Pinder-Guswa conflict of opinion.

If you are unable to determine the appropriate date by a preponderance of the evidence, you should enter the letters ND, standing for "not determined."

Question 3 asks you to determine with respect to each defendant whether a substantial contribution to the contamination to Wells G and H prior to May 22, 1979 by any chemical as to which you have answered yes in Question 1 was caused by negligence of each defendant; that is, the failure of the defendant to fulfill any duty of due care which it owed to the plaintiffs.

In considering the question of the negligence of the defendants, you must first consider whether there was any duty of due care to the plaintiffs. The defendants did not owe a duty of due care to the entire world.

We're not concerned with generalized carelessness. We're not concerned with standards which might be relevant if this was an enforcement action by a public body. We're concerned with a particular case by particular plaintiffs against particular defendants. The defendants owed no duty of due care with respect to groundwater to anyone who was not likely to drink water from the Woburn wells. It is for you to determine whether a reasonable person in the position of the people in charge of the defendants' land in the light of information reasonably available to them at the time should have foreseen that the people who were likely to drink the water from Wells G and H would be harmed by anything that the defendants might do on their own property. Only if such harm was reasonably foreseeable was a duty of due care owed by the defendants to the plaintiffs.

You have not been offered any expert testimony as to what constitutes negligence or what constitutes due care. If you find that there is a duty of due care running from the defendants to the plaintiffs, then it is up to you to determine, as representatives of the community, what conduct was required of the defendants to fulfill that duty in all of the circumstances which existed at the time.

end E

You may not judge their conduct on the basis of hindsight or in the light of new knowledge or altered community standards which may have developed since the relevant time. The Defendants are not to be held to a standard of perfection, but a standard of reasonableness under all of the circumstances. This determination is for you to make, and I can only give you some general guidelines.

What other manufacturers in the community do with waste chemicals is some evidence of due care, but it is not conclusive because the entire industrial community may be negligent in this respect. Violation of a statute or regulation of a state agency is evidence of negligence if it is causally related to the harm which occurred and the statute or regulation was designed to prevent such harm.

There was a regulation in force in Massachusetts after 1973 which provides as follows: "No person shall dispose of hazardous waste at a land site in the Commonwealth unless the site has been approved by the Division of Water Pollution Control for disposal of that class of waste." It further provides that the materials classified as hazardous waste include chlorinated solvents. Now, this regulation prohibits purposeful action and for reasons that I have yet to -- Excuse me, does not strictly relate to Beatrice. However, due care requires that persons engaged in business be familiar with the rules and regulations that govern their

activity, and this regulation is evidence from which you may find that the Defendants were put on notice that chlorinated solvents constituted hazardous waste.

As of 1973 another State regulation provided a penalty for "any person who directly or indirectly, throws, drains, runs, discharges, or allows the discharge of any pollutant into any waters of the Commonwealth without a permit." The term "pollutant" includes industrial or commercial waste, and the term "waters of the Commonwealth" includes groundwater.

Since 1961, Massachusetts has had regulations which provide, "No ... manufacturing refuse or waste product or polluting liquid or other substance of a nature poisonous or injurious either to human beings or animals, or other putrescible organic matter whatsoever, shall not be discharged directly into or at any place from which such liquid or waste may flow or be washed or carried into said source of water supply or tributary thereto."

Violation of a regulation is not conclusive with respect to negligence, it is evidence. It is not conclusive any more than lack of violation is conclusive that there was due care. Negligence may exist independently of the effect of such regulations.

Permitting a condition on one's land that is likely to interfere with a public right constitutes the

maintenance of a public nuisance. There is a public right to public drinking water free of harmful artificial pollutants. The maintenance of a public nuisance is evidence of negligence. To the extent necessary to protect others from an unreasonable risk of harm, a land owner has the duty to take reasonable steps to prevent trespassers from creating dangerous conditions.

Due care does not require that special precautions be taken against that which is only remotely possible, or unusual and unlikely to happen. Foreseeability of harm resulting to the class of persons which includes the Plaintiffs is a key factor in determining whether a Defendant's conduct is negligent, even if that conduct constitutes violation of a regulation. Foreseeability has two aspects: Firstin determining whether a duty exists, and secondly in determining what level of care constitutes due care. And it is, as I have said, for you to determine what care is due.

While foreseeability that some harm was likely to fall -- excuse me -- While foreseeability that some harm was likely to result from the waters of Wells G and H is an element of negligence, you may find either Defendant negligent under all of the circumstances, even though the extent of the harm and the manner in which it occurred was not foreseeable.

To put that another way, if you find that some generalized harm, substantial harm was reasonably foreseeable, that is one of the elements of negligence even though it would not be particularly foreseeable that water moved in a particular way or that pressure gradients are just so or that people who drink the water are going to come down with any particular disease. If it turns out -- I don't know yet what the evidence will show -- that there was some connection between these chemicals and leukemia, it would not be a requirement of a finding of negligence that the Defendants specifically foresaw that that was the disease that would result. So long as it was reasonably foreseeable that harm would come as a result of their conduct.

Steps which must be taken to fulfill the duty of care should be proportionate to the seriousness of the foreseeable risks.

The negligence of any officer or employee of a corporation, from president to janitor, acting within the scope of his employment, is attributable to the corporation. If, however, the employee's conduct violates a known company policy, which has been consistently applied and enforced, or unpredictably violates the orders of superior officers of the corporation, the negligence may not be attributed to the corporation.

I have previously ruled, and I now instruct

you that under the law of Massachusetts there was no duty on the part of either Defendant to warn anyone of the conditions existing on its land.

The standard of care for each Defendant is the same, but the evidence relating to each Defendant is quite different, and you must decide Question 3 separately as to each Defendant. As to both Defendants, you will notice that Question 3 refers to contamination caused by the negligence of the Defendants. You must answer this question "No" unless you find by a preponderance of the evidence that conduct you have characterized as negligent caused the contamination of Wells G and H by the complaint chemicals.

The placing of the chemicals in various places by Grace employees, the level of supervision by the plant manager, the extent of utilization of the information and expertise of the Grace Corporation to prevent environmental harm, and the level of familiarity with their environments are all elements of evidence which you may consider in determining whether Grace fulfilled any duty of due care which you find it owed to the Plaintiffs.

Now, I think there is testimony in the case for you to make this judgment, but it is my recollection that at least some of the Grace officials said that they didn't know there were any wells down there. And you may also consider whether in the exercise of due care they

should have been sufficiently familiar with their surroundings as to have learned that there were wells down there. Mr. Riley's testimony on this is again for you to recall, but I suggest that he left it with us that it was generally known that the wells were down there. He knew that the wells were there. Now, it is for you to say whether due care, the duty of due care required the Grace people to know or find out what the situation was on the enviroment of which they were in.

There are some restrictions on the evidence relating to Beatrice, however, which result from my rulings narrowing the issues, which I have previously described. First, Beatrice, or Riley, owed no duty of due care with regard to property owned by the City of Woburn. The second point is that evidence of pollution from the tannery affecting the 15 acres all relates to periods before August 27th, 1968, therefore, consideration of negligence in relation to the tannery activity is out of the case, and you should not consider it. There is, moreover, insufficient evidence of the complaint chemicals ever having been in the tannery waste.

The key person in charge of the 15 acres during all of the relevant period was Mr. Riley, either as an employee of the Riley Company or of Beatrice. In considering whether Riley was negligent after 1968, you may

consider the condition of the 15 acres before August, 1968, that Riley knew about or should have known about.

In deciding Question 3 as to Beatrice, you should consider only the following: First, under the standard that I have mentioned, did Beatrice owe a duty of due care to the Plaintiffs?

Second, if there was such a duty, did this duty require Riley to inspect the property, to monitor dumping activity by trespassers more actively than he did?

Third, if there was such a duty, should a reasonable person in Riley's position in the exercise of due care have realized that after August, 1968, that continued dumping on his land by trespassers would create an unreasonable risk that toxic chemicals would reach the groundwater under his land and thence migrate to Wells G and H?

And, fourth, should Riley in the exercise of due care after 1968, have taken more effective measures than he took to prevent trespassers from dumping waste materials on the 15-acre tract? That is fairly thick language. I am going to read it again and perhaps by repeating it, it will be clearer.

First, under the standard that I have mentioned, did Beatrice owe a duty of due care to the Plaintiffs?

Second, if there was such a duty, did this duty require Riley to inspect the property, to monitor dumping activity by trespassers more actively than he did?

Third, if there was such a duty, should a reasonable person in Riley's position in the exercise of due care have realized after August, 1968, that the continued dumping on his land by trespassers would create an unreasonable risk that toxic chemicals would reach the groundwater under his land and thence migrate to Wells G and H?

And fourth, should Riley in the exercise of due care after 1968, have taken more effective measures than he took to prevent trespassers from dumping waste materials on the 15-acre tract?

In considering these questions, you should take into consideration the nature and location of the property, its relation to the tannery and its surrounding areas.

If you answer any part of Question 3 "Yes" aso to either Defendant, you must move on to Question 4. If you have answered "No" to all parts of Question 3, you need go no further as to that Defendant.

The fourth question with respect to each Defendant requires you to further refine the question of time to determine the time at which the substantial contribution to the pollution of Wells G and H was attributable to

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negligent conduct by each Defendant. This may be the same as the answers to Question 2, or it may be different if, for instance, you find that some intervening event, such as the enactment of a regulation, gave the Defendants notice of the foreseeability of harm which did not exist before.

In order for you to return an answer to any question, it is necessary that each juror agree with the answer; that is, the six regular jurors. Your decision as to each answer must be unanimous. That means that unless all of you agree with respect to a particular question, you may not return any answer to that question. That's not a suggestion that I'm inviting you to return no answer to the question. It means to strive to arrive at an answer to each one of those questions.

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement if you can do so without violence to your individual judgment. You must each decide the questions for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors.

In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous, but do not surrender your honest conviction as to weight or effect of evidence solely because of the opinion of your fellow jurors or for the mere purposes of answering these questions.

Remember at all times you are not partisans; you are judges, impartial judges of the facts. Your sole interest is to seek the truth insofar as it may be revealed to you by a preponderance of the evidence. As judges of the

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facts, you should not be persuaded by sympathy or fear or favor, nor should you make distinction between parties who are individuals and parties which are corporations, as both stand equally before the law and both are entitled to your fair and impartial consideration of all of the evidence in the case.

At this point, the lawyers have the right and the duty to advise me of what they consider to be errors and omissions in the instructions that I have given to you and to preserve their rights. So now we will go through that procedure.

This may be a fairly long procedure. Why don't the jurors take a recess and go up to the jury room. If there's more to come, we'll call you back.

(Whereupon the jury left the courtroom.)

(CONFERENCE AT THE BENCH AS FOLLOWS:

THE COURT: Plaintiff gets the first crack.

MR. NESSON: First, your Honor, I'd like to say it was a very reasonable charge, and I want to make these objections for the record.

THE COURT: Okay. Don't be too polite.

MR. NESSON: I'm not always polite.

First, I want to make sure that we are not waiving any objections that relate to the directed verdict. That is, our failure to object here --

THE COURT: I don't think so.

MR. NESSON: I don't want to waive any objections with respect to our opinion on duty to warn.

THE COURT: I don't think you did.

MR. NESSON: Elimination of the tannery waste from the case, the dates '64 to '68, all the directed verdict issues.

THE COURT: Sure.

MR. NESSON: Then we would object to the absence of an instruction that the defendants are obliged to be familiar with the law that applies to them, that essentially an ignorance of the law is no defense, and that was --

THE COURT: I think I said that, didn't I?

MR. TEMIN: You did, your Honor.

THE COURT: I think that I said--

MR. TEMIN: Page 23, your Honor.

THE COURT: "Due care requires that persons engaged in business be familiar with the rules and regulations that govern their activity."

MR. NESSON: I withdraw that.

And the last, your Honor, on Page 24 you make the statement that foreseeability of harm resulting in the class of persons which includes the plaintiffs is a key factor in determining whether a defendant's conduct is negligent, even if that conduct constitutes violation of a regulation.

Now, on Page 22, I think you've said what I believe is right; that is, violation of a statute or regulation of a state agency is evidence of negligence if it is causally related to the harm which occurred and the statute or regulation was designed to prevent such harm.

Now, if that's true, then even though the person may not be tuned in to the purpose of the statute, if he's violating the statute and knows he's violating the statute, foreseeability is out of it. That is, it is --

THE COURT: That's that --

MR. JACOBS; Famous case.

THE COURT: I don't know if it's famous, but it's fun to read.

MR. JACOBS: Falk versus Finklestein.

THE COURT: Falk versus Finkelman. Did you read that case?

MR. NESSON: No, I haven't read that.

THE COURT: Incredible case. This guy parks his car opposite a dirt pile. The road is already narrow, and he narrows it even further by reason of parking his car. It's a violation of the local ordinance to park his car there. As he's standing there on the sidewalk with the plaintiff, they both hear the fire sirens, and there's a big piece of equipment coming down, say, Myrtle Street and another piece coming down Maple Street, and they both know they're coming.

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And the defendant says, "I think we'd better step back out of the street here or we'll get hit by these fire trucks." The two fire trucks come crashing into the center of town, they hit one another, and one of them is turned over and, in the course of turning over, hits the defendant's car and pushes it up on the sidewalk and it runs into the plaintiff and injures him. The Court said that even though the defendant was in violation of the ordinance and the ordinance was designed to maintain the streets free for travel, that this was not a foreseeable result and, therefore, the defendant is not liable.

MR. NESSON: I've noted my objection for the record.

THE COURT: It is an old case, 1929, 268 Mass. something or other.

MR. FACHER: How old is Gray against Boston Gas?

THE COURT: Well, that's a little older.

MR. NESSON: I've been passed something here. This is a case that supposedly distinguishes Falk. Let me just mention it's Leveillee versus Wright, 15 NE 2d. -- it's a Massachusetts case -- 15 NE 2d. 247, and the material that's relevant is on Page 251.

THE COURT: The yellow stuff I guess you're supposed to be reading.

MR. NESSON: Violation of law is regarded as a cause of injury only where the unlawful or forbidden element in the conduct complained of, rather than the conduct viewed as a whole, is found to be the cause.

THE COURT: I don't understand what that means.

MR. NESSON: Instead of being an intermediary, could I have the person--

MR. KEATING: No.

MR. JACOBS: No.

THE COURT: I'm going to stay with -- I think I've done it the right way. I'm not going to change it, anyway.

MR. NESSON: All right. In that case, I'd like to note our objection to the failure to give an instruction with respect to the Massachusetts Department of Public Health's 1962 regulation, which is Regulation 2.18, the regulation that's specified and set out in our instructions at Page 7, Paragraph Number 12; and also the failure to instruct on General Laws Chapter 111, Section 150(a), the instructions to the effect that you can't use your property as a dump, the instructions set out in Paragraphs 17, 18, 19, 20,21 and 22, which are Pages 11 and following in the plaintiffs' preliminary requests for instructions to the jury.

MR. SCHLICHTMANN: The ordinances, Charlie, do you have the ordinances of the City of Woburn?

MR. NESSON: Yes. The ordinances of the City of Woburn underneath the statute, which are described in the paragraphs that I have indicated.

MR. SCHLICHTMANN: All right. Just for the record.

THE COURT: Is that it?

MR. NESSON: Yes.

THE COURT: Mr. Facher?

MR. FACHER: Your Honor, I would like to object to your instructions in two categories. First, the instructions as you delivered them and the language that I will point out to you that I think is incorrect and, secondly, to those instructions which we requested that you did not give. And I will set forth for the Court as briefly or as fully as you prefer the reasons for my objections. Some of them will be obvious and we've already argued them. And in doing that, I will use, merely as a reference point, the possible charge that you provided to us because a great deal or most of the language you did in fact use, but it will be the transcript that governs. But I will point out the pages on your possible charge that I'm talking about and the exact language.

First, with respect to the Maher letter, we

would object to your Honor's stating that the letter which indicated that the water table had been lowered -- that before that letter, there was no legally sufficient evidence, the basis being that that is a suggestion that this letter did constitute legally sufficient evidence.

THE COURT: It did.

MR. FACHER: The correction---

THE COURT: I think I had the distinction between "legal" and "sufficient."

MR. FACHER: I think your Honor's language should be consistent with the later part or opinion in which you did say it was arguable.

THE COURT: I also made a general statement about the effect of my rulings.

MR. FACHER: You said it was for you to determine whether it was reasonably foreseeable after that time.

THE COURT: Well, I made a general statement about the effect of the rulings as not bearing upon what they should do.

MR. FACHER: My point only being that I think this was the first that could be considered by the jury as the first arguable instance, but it need not have been considered by them. The way it was left the jury will think, well, indeed, this is the starting point. I believe from prior conversations at the bench your Honor's intention was this was at least the possible starting point, but you don't have to buy it as a starting point.

THE COURT: That is my position, and I think I conveyed that adquately.

MR. JACOBS: Go ahead.

MR. FACHER: You already have hit me on the back and I haven't said anything.

MR. JACOBS: Just proceed.

THE COURT: This is one of the advantages of your partner Perry's method.

MR. FACHER: Which is?

THE COURT: Appearing solo without all the little factory of workers.

MR. FACHER: That is right. You have to know whether the workers are outside the door or not. However, it is an approach we have discussed over the years.

The same objection occurs on Page 9 of the so-called probable charge and the language about the Maher letter -- Not the Maher letter. The language about movement. You suggest that level of the water may be circumstantial evidence of the direction which the water flows.

THE COURT: Yes.

MR. FACHER: And that direction which the water flows may be inferred from the data perceived at the well. I think when taken with comments about the Maher letter, that may provide an erroneous inference that well level means water movement, which is a matter that I argued and I will point that out as an objection to your Honor.

THE COURT: I don't find that connection between the two parts of the opinion to be in the least

prejudicial.

MR. FACHER: The question on circumstantial evidence, in which to say generally is given as it appeared on Page 10, and your Honor's amplified it a little bit during his charge, generally suggests that circumstantial evidence is better evidence than the direct evidence.

THE COURT: Sometimes maybe, is what I said.

MR. FACHER: Yes.

THE COURT: That is a charge that you and I have heard thousands of times over our last 30 years.

MR. FACHER: Yes, we have heard it.

I think there is an undue emphasis on that as a basis for inferring. This is the more serious basis for my objection, that this case can be decided on the circumstantial evidence of the condition of the land alone, and I think that is in there because you say "Plaintiffs ask you to infer such pollution," meaning the earlier pollution, I really would have preferred "chemical contamination," but that is the context of what you meant. But Plaintiffs asked you to infer that such pollution, that is, the earlier pollution can be inferred. I do not believe, and I would suggest to your Honor that in order to provide the basis for correction that the condition of the land, that is, the inference of chemicals can be inferred from the condition of the land. You need the opinion.

THE COURT: That's right. I think I say that later on. The only evidence is the opinion of Drobinski. I make that very specific.

MR. FACHER: I did hear that. And the section I suggest to you, and I won't belabor it, the suggestion and the part about circumstantial evidence suggests they can go from a condition in '85 to a condition in '65 on circumstantial evidence, and that, I think, is a connection that I don't believe your Honor believes it can be made, and I believe your Honor believes you have instructed about it. I think the circumstantial part didn't say that. It suggested the verdict could be based on circumstantial evidence alone. That is the basis for that objection with respect to the language on circumstantial evidence.

THE COURT: Who is the tall bald gentleman?

MR. KEATING: I'm not sure. I think he is with us. Would you like me to find out obliquely.

MR. FACHER: Find out by circumstantial evidence.

THE COURT: Circumspectly.

MR. KEATING: Yes, I'm sure he is with our people. It looked like Judge Keeton, I thought, when I turned around.

MR. FACHER: I wanted to object to your

Honor's discretion on one of the bases for the expert opinion on water flow, that is, your Honor's statement about another principle is that water runs from a high head to a lower one without the further explanation that deals with other matters preventing water from going from a high head to a low one. In other words, the instruction, if you are going to give an example, which I thought would be far away from the facts of the case, which we previously discussed, I think is incomplete and might be misleading.

THE COURT: I think I told them if there was a higher intervening---

MR. FACHER: You talked about A, B, and C. Again, the inference of water flow from two points is an incorect inference, which I would object to.

MR. JACOBS: It would actually be flow from a high, medium, and low point in terms of a plane, then you have to figure out from those points where does it go? It is not horizontal flow. That is what the Court described.

THE COURT: In probably two or three hours I could probably explain it, but I am not going to. I will leave it as it is. They understand it.

Move on.

MR. FACHER: I'm trying to, your Honor.

The question of causation, I think, as handled in the instructions, may come back to haunt your Honor with

a problem.

THE COURT: It won't come back to haunt me.

MR. FACHER: It may come back to haunt me, and, therefore, we want to talk and see if we can help you.

THE COURT: The wonderful Rule 8, if you get reversed it goes to another Judge.

MR. FACHER: You talk about the Plaintiffs' burden to establish by a preponderence of the evidence, which is on Page 16, which is the way you gave it, that the chemicals traveled from the property and reached Wells G and H in sufficient quantity to be an operative and potent factor.

THE COURT: I just quoted from something.

MR. FACHER: You quoted from somebody's instruction. You did not give any explanation of either that phrase or deal with it in standard terminology that we have heard for many years on proximate causation or direct causation.

THE COURT: I can show you an opinion of the Court of Appeals that says that proximate cause is a phrase that should be avoided by district court judges.

MR. FACHER: Operative and potent does not do much more for you. I'm only suggesting that the question of causation, which is an important one --

THE COURT: I think that operative and potent is more favorable to the defendants than proximate.

MR. FACHER: Maybe. It seems to me that your Honor would want to explain it, whatever it means.

THE COURT: No, thank you. I appreciate the invitation, but I decline.

MR. FACHER: The language that you gave with respect to the City property on the Beatrice site, you said it did not belong to -- the Beatrice site does not include the property of the City, but there was nothing about the significance of that fact, if it had any significance.

THE COURT: I thought you'd already argued that.

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MR. FACHER: And we had requested that you relate the City property to Debris Pile F, which was on that property and of which there is no geographic dispute.

THE COURT: That's a matter of the evidence, which they can -- they saw and marched around. As a matter of fact, I think there was a manhole cover practically under Debris Pile F or very close to it.

MR. FACHER: The next objection that I'd like to relate to you is your reference to Drobinski's inference. You related what you believed to be the inference that Drobinski drew as an inference not only that there were these artifacts on the ground, but that the chemicals were introduced. And I--

THE COURT: I didn't say anything about chemicals. He said activity. That's the bottom line.

MR. FACHER: I submit that that is not -- it is not clear that it is true that he drew that inference, and your Honor perhaps should not refer to an inference that I think there's a dispute about whether he drew. And I'd ask you not to.

On the question of statutory violations-- sorry. On the question of negligence, your Honor said to the jury -- this appears on Page 21 and 22, but the language was the way you gave it. Your Honor said that it was for the jury to determine whether a reasonable person in a

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position in charge of the defendants', plural, lands should have reasonably foreseen that the people who were likely to drink the water would be harmed by anything that the defendants might do on their own property. And, number one, I object to the lumping of the two defendants together. Number two, I think it is incorrect and incomplete to refer to the plaintiffs' possibility -- or the foreseeability of the plaintiff being harmed by anything that either defendant might do on their property because --

THE COURT: As to identifying a class of people. Then there's a second step. Foreseeability of harm from what they did do.

MR. FACHER: But it was the harm -- the harm is not by anything that they did. The harm has to be, in this case, by certain specific things, not that they might do, but --

THE COURT: In the second step, yes. In identifying the class of people to whom a duty is owed, I think I've stated it correctly. In identifying the duty of care, I think you've stated it correctly. But there are two elements of foreseeability.

MR. FACHER: I understand that as you said it. I think this question -- I beg your pardon -- this language in which you talk about foreseeability that water drinkers would likely be harmed by anything is a vague and

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uncertain and incomplete kind of instruction.

THE COURT: It's why it's that way in that place and differently in another place, because of the two aspects of the foreseeability that I've just described. I'm not going to change it.

MR. FACHER: I further call your attention to the fact that we're dealing here with a non-action or failure to act, which is somewhat inconsistent with the way the language is given about anything that might be done on their own property.

THE COURT: Well, done by others, I suppose. Somebody did something. These things just didn't generate. If you're talking about pollution by poisonous mushrooms, why, that would be a different story.

MR. FACHER: You have to start with something happening for which the defendants are responsible.

THE COURT: Well, that's right. That's what I described for them.

MR. FACHER: In any event, I object to that language. I think it should be clarified and corrected.

The violation of the statutes, there are two aspects to that that I'd like to call to your Honor's attention. I think your Honor did not state that it was up to the jury to find that there had been a violation. You talked about violation of statutes in the abstract, but the

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jury has to make that determination, and nowhere in the charge do you say "It's up to you to decide whether this statute has been violated. I'm not deciding it."

THE COURT: I didn't give them any indication that I decided it.

MR. FACHER: No, I understand that. But I think it's their business. I actually think the Court should decide whether a statute is violated and that somebody has to be told who finds the violation.

THE COURT: I think I left it to them. Pretty clear in general language. I don't think I have to repeat that every two minutes.

MR. FACHER: I think the jury must find that the statute has been violated. Also, it must find that it applies to Beatrice. You said the regulation prohibits purposeful conduct -- this is an addition you made.

THE COURT: I said it does not apply--

MR. FACHER: You said it does not strictly relate to Beatrice. I didn't know what the adverb meant, frankly.

THE COURT: Meaning that there was never some indication of notice about the hazardous character of chlorinated chemicals.

MR. FACHER: But there is no -- I suggest that the instructions on statutes are inconsistent with the

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instructions about the purposeful conduct about Beatrice.

THE COURT: I think I specifically related it.

MR. FACHER: The intent aspect I'll deal with in the requests for instructions when I get to those.

THE COURT: Sure.

MR. FACHER: You did not, however, eliminate the 1973 regulation, which is, "Any person."

THE COURT: "Who allows." That's why.

MR. FACHER: I suggest that and request that that be corrected because there was nothing in the tannery waste and there was no purposeful conduct.

THE COURT: The statute says anybody who allows the discharge of all of this stuff.

Okay. Go ahead.

MR. FACHER: The same is true for the '61 regulation. Again, as to all of these, I'm calling attention to the lack of causal connection and the lack of violation. But as to the '61 regulation, there is no evidence of discharge, of refuse or waste products of a poisonous nature, and so forth, and there's no reason in logic why that should apply to Beatrice or why the jury should speculate about its application. And I think you also suggested that it's a surface water regulation rather than groundwater.

And on the question of nuisance, your Honor said permitting a condition on one's land that is likely to

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interfere with a public right constitutes the maintenance of a public nuisance. I do not believe that is correct, especially the language "permitting a condition that is likely to interfere." I think for public nuisance you need to show that it exists from negligence or direct conduct and that it must interfere, has interefered and is not just likely to interfere.

THE COURT: In order for it to be independently actionable, that's right. But I refer you to the Town of Wareham case that Mr. Jacobs called to my attention.

MR. FACHER: I call your Honor's attention to better authority; namely, your own opinion on the directed verdict, which talks about knowledge, about the condition, and then permitting it to continue after the knowledge has been gained. None of that was in the instructions that you provided, and I think the jury is left with the feeling that if there's any condition likely to interfere, that could be a nuisance, that the nuisance could be negligence, that the negligence --

THE COURT: This is evidence. If there's evidence of that.

MR. FACHER: I suggest that knowledge and continuation after the knowledge, which is what I thought your Honor was going to charge from our chambers conference--

THE COURT: I think you go along and you get the four issues chargeable. I think that's incorporated in those four issues.

end I

THE COURT: I don't think I have to give every element of every aspect of every issue every time.

MR. FACHER: Well, this is the only time you talk about this, and I am stating these for purposes of assistance, if your Honor wishes to correct or reject----

THE COURT: I understand.

MR. FACHER: I am not stating them for the record.

THE COURT: I appreciate your effort.

MR. FACHER: I am stating them because I don't think they are correct, and I think you should know I don't think they are correct.

THE COURT: I appreciate that.

MR. FACHER: It has nothing to do with my personal respect for the Court of anyting else.

THE COURT: I understand.

MR. FACHER: All this nonsense for the record, it is not for the record, it is because I think they are not right.

THE COURT: Okay.

MR. FACHER: You added something on the question of foreseeability that I think was erroneous, and it was not in your original probable charge, and I want to call your attention to it. You added in the area of foreseeability a sentence which put another way, the

distinction between generalized harm and the extent of the specific harm, and what you said was -- The original language was on Page 25 of the probable charge. What you said was, put another way, if some generalized harm was reasonably foreseeable, even if it was not particularly foreseeable about the water movement, then that satisfied the standards of foreseeability.

I have not quoted you precisely, but I think you will find it close to what you said.

THE COURT: I think I said the particular details of the water---

MR. FACHER: The particular foreseeability of the water movement.

MR. NESSON: If you find that some generalized harm, substantial harm, was reasonably foreseeable, even though not particularly foreseeable that the water would move in a particular way or that the direction -- no, something I can't read here of water, come down with a particular disease, the consumers of water coming down with a particular disease as long as reasonably foreseeable harm, would come as a result of their conduct.

MR. FACHER: I think the Court knows the section I am talking about.

THE COURT: I don't recall the exact language. I tried to get across they didn't have to know the details.

MR. FACHER: There are two things that I think came out wrong, No. 1---

THE COURT: Which I think is the Restatement 435.

MR. FACHER: Two things that came out wrong. I appreciate Mr. Nesson's help. The two things that came out wrong was generalized harm, which is a dangerous phrase in the area of foreseeability, because the harm that we are talking about is harm to users of the water supply.

THE COURT: I must have said that ten times.

MR. FACHER: I think the second part about it was your reference to the water movement, and I think---

THE COURT: I don't see how I can straighten it out at this point without making matters worse, assuming that I loused it up in the first place.

MR. FACHER: Well, I think it is sufficient to straighten it out. Many times Judges do make it worse, but I think your Honor could make it better by talking about the harm you are talking about is water user harm.

THE COURT: I guess I've said that. I know I could find you four places.

MR. FACHER: We made a particular point about movement. I think there is a question that there should be some foreseeability of movement.

THE COURT: Yes, in a general way.

MR. FACHER: I object to that portion of your charge.

Now, I would like to remind your Honor of certain things that your Honor indicated you might want to tell the jury about. The stricken exhibits and testimony, nothing was said.

THE COURT: No, I didn't. I told them to disregard the testimony concerning one aspect. I told them also stricken exhibits -- They could use all the evidence except the stricken exhibits.

MR. JACOBS: They were never told you struck it.

THE COURT: What did I strike?

MR. FACHER: You struck 452, 542, 651, 562, all that stuff about the -- and they may well remember and have notes about the Bolde DPH engineer, the McGuire report about the sludge on the banks of the Aberjona, all of that, the memorandum of March 9, '83, about the MDC, the '56 letter, July 17th from Sterling, Clarence I. Sterling, the two-page letter that there was such a fuss about.

MR. NESSON: You did tell the jurors that all of the evidence with respect to the tannery activity prior to '68 was out, and that would sweep all of that stuff in. Going through it one by one---

THE COURT: They won't have it with them.

MR. FACHER: They have made notes about specific evidence.

THE COURT: Well, the dates of all of these are behind the time, aren't they?

MR. FACHER: The dates are -- No, they don't. The '83 date is after the time on the MDC, and the business about these letters which were clearly, you made a special point at one point to say this letter is being given to you for purposes of showing you notice about the possible dangers of putting things under the river, or some word.

THE COURT: Then maybe they should stay in there. I let it out.

MR. FACHER: No, you struck the letter for all purposes.

Now, you said yesterday, when I objected to the following argument, "Mr. Schlichman: W.R. Grace and Beatrice Foods do not have the right to point elsewhere outside this Courtroom until they point across these two tables at themselves."

I said, "I object. That is not a proper argument."

You said, "I will deal with that in the instructions."

THE COURT: I did.

MR. FACHER: May I ask in what way?

MR. KEATING: Where?

MR. FACHER: There was nothing about finger pointing or no inference to be drawn from the fact that the Defendants don't accuse each other. That matter, which, again, was raised in the television, the news matter, that doesn't appear in your charge. Do you think that is a proper thing for the jury to consider, why didn't these two people accuse each other? I think it is highly---

THE COURT: I think it would be foolish.

MR. FACHER: I asked you to do something about it in the charge, and you said you would do it in the instructions.

THE COURT: I think I have in a general way. I said they could find one or the other, they could find both. They have to find this in connection with the other pollution.

MR. FACHER: An improper suggestion is made that the Defendants have some duty to point to each other, which is really a dreadful argument. It should not have been made. It had nothing to do with the evidence.

MR. FACHER: There is one thing in a conspiracy to say they both conspired. That is just not the way people try cases. It is not even within the license, but, in any event, I made the point.

THE COURT: I think it will be treated as---

MR. FACHER: Excessive rhetoric.

THE COURT: ---excessive rhetoric.

MR. FACHER: I don't think so. I hope you are right. I think it is a distasteful and improper thing to have said.

THE COURT: Kind of stupid, as a matter of fact.

MR. FACHER: That was said in the opening, and I forgot to remind the jury about that.

THE COURT: That is neither here nor there.

MR. FACHER: I would like now to turn to, and I need to know, your Honor's---

(Discussion off the record between Facher and Jacobs.)

MR. FACHER: You added something about the presence of chemicals, I do remember that. Page 15. You have to forgive my tenacity, but this is the way they tell us to do it.

THE COURT: You don't preserve your rights unless you do it.

(Discussion off the record between Mr. Jacobs and Mr. Facher.)

MR. FACHER: Well, the language was added by your Honor with respect to disposal of chemicals on the site, on the Beatrice site. In dealing with Question 1, and

you added that you have to deal with the presence or disposal of chemicals on that site. I think its presence and disposal, disposal and presence of chemicals on the site between the starting date -- that language was added to as it appeared on Page 15 of the probable charge.

Now, I would like to turn to the instructions that were requested and in our view not given. I need to know about your Honor's policy, whether you want each instruction explained as to what the significance is and the basis of why you should give it or whether I can refer to the number.

THE COURT: I think you can refer to the number.

MR. FACHER: Some of the opinions in other states, if you just refer -- In fact, there was a First Circuit opinion once, if you just refer to the number, it is not enough because---

THE COURT: Recite what you've got there.

MR. FACHER: Okay. I will recite---

THE COURT: I think more recently---

MR. FACHER: If I have to read every one of them, we will be here until four o'clock.

MR. SCHLICHTMANN: If it is in the record, can't he just give the number?

THE COURT: You filed that.

MR. FACHER: Yes, that is what I want to refer to.

THE COURT: Okay.

MR. FACHER: Those that require additional argument, I will make a 10-second objection.

THE COURT: Okay.

MR. FACHER: First, on the failure to give the requested special questions, I think your Honor previously reserved all rights, and on behalf of everybody, I'll---

THE COURT: Sure.

MR. FACHER: ---object and reserve everybody's right and---

MR. TEMIN: Thank you.

THE COURT: Your rights are saved, too.

MR. SCHLICHTMANN: Everybody's rights.

MR. FACHER: I will do that for everybody.

Now, the second request for jury instructions that I filed this morning, I respectfully object to your Honor's failure to give Instructions 8 through 12. It is 8, 9, 10, 11, and 12, which relate to the violation of the statute and deal with whether the jury should decide the violation whether the statutes are penal, whether they are applicable to Beatrice, and what the elements of a violation of a statute must be in order to constitute negligence. That

is the general subject of those.

I also would like to object to your Honor's failure to give No. 1 of -- This is all with respect to the second request -- that deals with the Maher letter.

THE COURT: You have already called that to my attention.

MR. FACHER: Yes. This is just simply a failure to give the requested instruction.

No. 2 deals with your Honor's failure to say anything about the relationship between the phases of the case and whether or not people ought to be saying, "I better not decide this one way, because I'll never be able to figure out what happened," and I think your Honor might want to say something about that.

THE COURT: I don't.

MR. FACHER: The comments about environmental policy and corporation caring, I've requested an instruction on No. 3 of the second request, and I object to your Honor's failure to give it.

THE COURT: I gave that in substance. It is not in the typed bit, but I think I stuck it in in the end there.

MR. FACHER: About everybody is equal under the law?

THE COURT: No, I said something earlier

than that, I said something about the considerations are not the same as they would be if this were an enforcement, environmental enforcement case.

MR. FACHER: The reference requested Instructions 4 through 7, dealing with the various characterizations and misstatements, as I perceive them in the summation, which I would ask your Honor to correct since there is no other way to correct errors in summation apart from a mistrial.

Four deals with the reference to the 1985 exhibits, as if they existed in '68. Request 5 deals with the lumping of the two Defendants together with respect to dumping of chemicals; that is not the evidence. Six deals with the alleged poisons dumped by Camerlingo, and seven deals with the Guswa testimony with respect to present state rather than past state.

THE COURT: That was given correctly, I think. It was correctly incorporated into that aspect.

MR. FACHER: I think the aspect of the 1986 was not accurate in that, but your Honor has ruled on that. That takes care of the second request. And I would now like to--

THE COURT: Are you going to go through that big fat volume?

MR. FACHER: I have to, your Honor.

MR. SCHLICHTMANN: Is it possible to just refer to the numbers, because we went over them.

THE COURT: Why not do it by number.

MR. FACHER: I'm going to do it by number. To the extent that I have a hope that we might change your mind, I might make a comment.

I respectfully object to your Honor's failure to give the following instructions from our first set of instructions. Number 28 with respect to burden of proof and with respect to whether defendants have any burden; Number 30, also with respect to burden of proof; Number 39 with respect to nuisance, Number 41 with respect to purposeful conduct; Number 42 and 43 with respect to nuisance, public nuisance, with respect to nuisance as evidence and non-evidence of negligence; Number 49 with respect to disposal practices of the tannery, Number 53 with respect to distinguishing between non-action and action. In the charge the tannery is being accused of failing to act.

K2

Number 56 with respect to the chemicals involved in this case; Number 58 with respect to the legal principles and elements of the plaintiffs' case; Number 59 with respect to the elements of the plaintiffs' case; Number 60 with respect to disposal by trespassers of complaint chemicals. I think that was not sufficiently clear that it was activities of the trespassers, if there were such activities, not in dumping chemicals, because there was no evidence of dumping chemicals, but in the dumping if there was any of debris and barrels which they now have to find mean chemicals. That's been a problem all through the case.

THE COURT: Well, the chemicals are there. You say you didn't put them there.

MR. FACHER: They are there.

THE COURT: They didn't grow there. So if you didn't put them there, trespassers put them there, right?

MR. FACHER: No.

THE COURT: Who put them there if you didn't put them there and it wasn't the trespassers? Somebody put them there.

MR. FACHER: A flood could put them there, a sewer could put them there. It's possible that a trespasser could put them there. But, on the other hand, the point I'm making is a little different: That the trespassers didn't put chemicals there. Whatever they put was barrels and debris.

K3

THE COURT: Oh, I'm not sure of that. I think you can draw an inference that somebody just poured it on the ground. It's all in one spot. Floodwaters washing over the place and all of the stuff landing like that doesn't make any sense.

MR. FACHER: That's the problem. You're speaking to me as if 1985 is what you are talking about and the year '65 -- we don't know whether it was all poured in one spot in '65 or not.

THE COURT: We don't.

MR. FACHER: Or even in '85 from the testimony.

Anyway, if you don't mind --

THE COURT: Just press on. Sorry. Didn't mean to interrupt you.

MR. FACHER: I will press on and persevere, as I have done for many years. I've been at some bench conferences where the pressure has been much more direct than his Honor's. You've been very amiable, and I appreciate it. Many judges don't want to hear objections, but I'm going to make them whether they want to hear them or not.

THE COURT: Of course. Don't be thrown off by the fact that I'm yawning.

MR. FACHER: You can yawn, you can smile, you can scowl. I will press on.

K4

MR. SCHLICHTMANN: As long as the record shows he's here.

MR. FACHER: There's no other way to do it. If there were a better way to do it, I would do it. I'd give a tape if you wanted to listen to it.

Number 60, I object to your Honor's failure to give it, and it also deals with trespassers. The failure to prevent others from disposing of barrels is the subject of 62, which I respectfully object to your Honor's failure to give. I respectfully object to your Honor's failure to give 63, which talks about cannot be held negligent just because of general untidiness. There is an unnumbered -- I respectfully object to your failure to give an unnumbered instruction on Page 32 of our request with respect to Debris Pile F. Why it's unnumbered, I don't know. It has a title, and that deals with Debris Pile F being on City land.

The inference about the timing of disposal of chemicals I think are instructions that I would like your Honor to take a brief glance at because it was my understanding that you --

THE COURT: Say that again?

MR. FACHER: --indicated a disposition given when we talked in chambers. This general -- you didn't say precisely, but you said "Okay, in substance I'll take care of that in the charge," or words to that effect, about you

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can't figure out an earlier event from a later one and the existence of chemicals today cannot be concluded alone from the existence of chemicals--

THE COURT: I think I said --

MR. FACHER: of itself.

THE COURT: I think I covered it when I said if you don't go with Drobinski, you've got nothing. And I think that's true.

MR. FACHER: Then I would object to your Honor's--

MR. NESSON: We don't believe that's true.

THE COURT: But that's what I said.

MR. NESSON: That's what you said.

MR. SCHLICHTMANN: Our objection on reasonable inferences --

MR. NESSON: We're entitled to Drobinski's opinion, but we don't believe it's an essential--

THE COURT: You've had your bid.

MR. FACHER: I'll object to your Honor's failure to give 64 about chemicals from barrels; Number 65 and 67 with respect to inferences of chemicals from later conditions; Number 69 and 70 with respect to the same subject matter; Number 73 with respect to Drobinski being based on scientific techniques, failure to give 73; again, with respect to failure to give Debris Pile F as being on

K6

City land, which is encompassed in 76; the inference that complaint chemicals were placed on the land no earlier than the fall of '79 from the vinyl chloride evidence, that suggestion requested in Instruction 78, and I object to the failure to give it.

With respect to the elements of the plaintiffs' claim against Beatrice on knowing or should have known, I think the Court did not give Instruction 80 as to knowledge a tannery should have had about trespassers. I object to the failure to give 81 and 82, which deals with the same subject; that is, foreseeing chemicals from the presence of debris placed on the land by trespassers. And 83, which is the same subject with respect to placing of debris on the land by trespassers. I object to your Honor's failure to give 84 on what knowledge a tannery is presumed to possess, and 85 on the same subject, and 88 -- I withdraw that. I believe your Honor did say the conditions were not to be viewed with hindsight.

I would like to object on the general matters to be considered -- beg your pardon -- on the instructions relating to the general matters to be considered on the tannery's knowledge, particularly the failure to give 89 about release of chemicals into the groundwater not being a foreseeable consequence of barrels; again, 90, the presence of barrels as being insufficient evidence; 91, failure to

K7

give 91, talking about what it was customary for tannery people to know. You did say it was based on events or on the circumstances back then, but the reference to the failure to be able to test or detect was nowhere in the instructions, and that was what we were requesting. The same is true with respect to failure to instruct about whether engineers or other scientific people could tell --

THE COURT: Excuse me a minute.

(Pause.)

MR. FACHER: I would object to your Honor's failure to give 95, which deals with the fact that there was expert knowledge, specialized knowledge and persons with that knowledge were not able to foresee. 98 deals with foreseeability, and I object to your Honor's failure to give it. This deals with groundwater movement being unforeseeable to local agencies. I object to your Honor's failure to give the instruction with respect to Pinder because I think Pinder also must be believed. He's talking about Beatrice now. You said Drobinski had to be believed, but Pinder also had to be believed because the water has to get there.

THE COURT: I did. I said if you ended up with Guswa, you ended up with a "No."

MR. FACHER: I object to your Honor's failure to give 101 and 102 and 103 with respect to the lack of any burden on Beatrice to disprove these opinions. I

K8

respectfully object to your Honor's failure to give 106. These deal with the area of substantial contribution because there's nothing about their being required to find that these wells actually pumped for sufficient periods to get the stuff there in sufficient quantities and concentrations to be a substantial contribution. That was a failure to give 106.

On the contaminants' movement and foreseeability of water movement, chemical water movement, I would respectfully object to your Honor's failure to give 109 and, on foreseeability of dangerous chemicals getting into groundwater and polluting the water supply, your Honor's failure to give 110.

On knowledge of the tannery and whether the tannery is required to have special knowledge, I would respectfully object to your Honor's failure to give 112 and 113 and 115 and 116 on foreseeability based on a lack of specialized knowledge to members of the tannery community.

On foreseeability, I object to your Honor's failure to give 125 about persons with specialized knowledge and your Honor's failure to give 133 with respect to water movement and what an ordinary person would have known about groundwater. I object to your Honor's failure to give 134, which deals with the fact that the tannery has been charged with non-action and with the lack of causal connection between

the non-action and the plaintiffs' injury. 136, again I call your Honor's attention, there's a request dealing with proximate cause and dealing with whether the tannery's conduct was a substantial factor in bringing about the contamination. I object to the failure to give 136.

I object to the failure to give 137, which deals with proximate cause and the fact that the tannery's conduct had to be a substantial factor in bringing about the contamination.

141 also deals with causation, and it is in the language of the restatement about whether looking back at the harm to the conduct, it was highly extraordinary that that conduct should have brought about the harm. That is the type of language your Honor used in the directed verdict motion.

THE COURT: That is where it belongs, too.

MR. FACHER: I would object to your Honor's failure to believe that it belongs here. Didn't I put that nicely.

THE COURT: Beautifully.

MR. FACHER: That would be an objection of failure to include 141. And 143 is on the same subject. We are looking back from the harm. It was extraordinary that the condition should have brought it about. I object to the failure to give 143. The intervening cause, superseding cause instruction, is in 144, and we continue to request your Honor give that.

The standard of care of the tannery and the community is 150 in the next section, and I respectfully object to your Honor's failure to give that.

151 also deals with the standard of care with respect to guarding against dangers that one had no reason to foresee, and I object to your Honor's failure to give 141. I object to your Honor's failure to give 154, which deals with the burden of proving that the injury to consumers was a reasonably -- water consumers, was a reasonably foreseeable consequence to the tannery's non-action.

On due care, I object to your Honor's failure to give 157. This deals with the condition of the land. And the condition of the land includes being land locked, no public access, the property being owned by others, and unusability of the land.

I object to your Honor's failure to give 158 on due care, and 159 on due care.

On substantial contribution, I object to your Honor's failure to give 160. That is the instruction that says that once you know about the condition created by others, then that condition has to continue to take place after that knowledge. I think, as I pointed out before---

THE COURT: I covered that. That is not explicitly, but certainly inferential.

MR. FACHER: I think it includes both knowledge or not or should have known. Again, the language of 160, I object to your Honor's failure to give that in that language or in substance.

And 161 also deals with the requirement that there be additional disposal after a person knew or should have known.

I object to your Honor's failure to give 161. I object to your Honor's failure to give 163, which also deals with the failure to prove that the tannery should have known about activity by trespassers and the continued disposal by trespassers.

I object to your Honor's failure to give 165 as stated in the first set which deals with the violation of statutes. It says that somebody has to find the Defendant has violated the statute, and the statute must be the cause, the proximate cause of the Plaintiffs' injury. Neither of these statutes were violated, but neither were they causally connected. That is the basis for those. While -- I think that is all, but since it was substantial, while Mr. Keating is talking, I will re-review.

MR. SCHLICHTMANN: Other than that, he thought it was terrific.

MR. FACHER: Whether I thought it was terrific or terrible, has nothing to do with the exercise we are engaged in.

MR. KEATING: Mr. Temin is going to speak to this issue for Grace. Before he does, your Honor, I would like to point out that the first two or three matters

he raises here are not raised for the record. They are really raised for the fairness of some of the things that you said. There are some things he will tell you that are really record that are preserving us for another forum, but some of what Mr. Temin is about to say to you in the beginning we earnestly ask you to think about for this charge.

THE COURT: I tell you, why don't we take a 10-minute break.

MR. KEATING: That is fine.

THE COURT: I might as well try to come to Mr. Temin's comments with not necessarily fresh, but the level of attention I gave to the latter.

(Recess.)

THE COURT: You're on.

MR. TEMIN: Thank you, your Honor. I'll go through these things as quickly as possible, but I think it is important you understand the basis for the objections and, despite Mr. Keating's comments, as far as I'm concerned few of them are just for the record. But let me focus on some that we are particularly concerned about that go to the basic fairness of the charge.

The first is your statement with regard to foreseeability of the precise manner or nature of the harm. This is something that your Honor added today, and so we had not had an opportunity to react to it previously. This is on Page 15, I believe.

THE COURT: I don't know that I did it very well, but, anyway --

MR. TEMIN: It's not Page 15. In any case, the problem is that it essentially assumes or leaves the jury with the impression that there was, indeed, a connection between the chemicals and the wells and some sort of physical injury and particularly mentions leukemia, the most serious one. And so it leaves them--

THE COURT: Didn't I specifically say we don't know what the evidence will show?

MR. KEATING: No.

THE COURT: I said we do not know what the

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evidence will show about the connection.

MR. KEATING: I think it was about the connection between the chemicals and leukemia, but I think what Mr. Temin's point is is that we will contest vigorously in the second round that there's a connection between the illnesses and the wellwater. In other words, there's no concession on our part that there's a causal relationship, and that was the point that I think the jury will now feel has now been an established fact.

Excuse me, Marc.

THE COURT: No. Go ahead.

MR. TEMIN: Yesterday in his closing argument, Mr. Schlichtmann essentially asked the jury to assume that there was this medical causation and just asked them to get the plaintiffs over the burden of whose TCE it was that caused these things. And I think your specific reference to these types of injuries reaffirmed what Mr. Schlichtmann was asking the jury to do then. We're particularly concerned not only because we didn't have a chance to see it --

THE COURT: I don't suppose any of that. I don't remember exactly what I said, but I don't think I said what you said I said.

MR. TEMIN: We have never suggested, your Honor, that there was any need for foreseeability of any

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particular type of flow of groundwater or particular type of injury, so this is not to rebut any contention Mr. Keating made in his closing argument.

THE COURT: I understand.

MR. TEMIN: What we have said is it must be reasonably foreseeable that our conduct is going to injure someone and, in particular, in this context that means that the chemicals would get into the groundwater, would flow through the groundwater to a place from which there would be wells that would distribute them to people who drank the water, and it might cause injury to someone who drank that water. That's as specific as we've gotten, and that's the only conceivable route in which our conduct might have risked anything to anyone.

THE COURT: That's what I told them.

MR. TEMIN: Once you say it wasn't necessary for us to foresee this particular route of injury, it strongly suggests that not only was this a particular route of injury, but that our defense is that we didn't foresee that particular route. We've never contended that, and I think, particularly in light of a failure to instruct specifically with regard to the elements that we have contended as to foreseeability, it completely removes the question of the foreseeability of injury and it suggests that the issue is whether, given these terrible consequences

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that came about, we were required to foresee those particular consequences.

THE COURT: Well, I think that in giving the foreseeability test, I'm obliged to say, "By foreseeability I don't mean you've got to foresee every detail," or something along those lines, whether you've argued that, whether it's not to contravene any particular argument, but because that's the way of showing the parameters of the rule.

MR. TEMIN: That was what was in your written instructions, and had you given those as written we would have had no problem. Our concern is that you've gone beyond those to suggest a particular relation between the water and the illnesses, as to which there's absolutely no evidence in this part of the case.

THE COURT: I made that point. I think I said we don't know what the evidence will be.

MR. TEMIN: My notes don't show it. You may have.

THE COURT: I know that I did.

MR. SCHLICHTMANN: Those are precisely the words you used.

MR. TEMIN: The focus that you've directed to this really throws off what the foreseeability inquiry is.

THE COURT: I'm not going to change it, Mr. Temin, but thank you for calling it to my attention.

I'm not going to change it.

MR. TEMIN: Thank you.

Another matter as to which we're particularly concerned came in Page 19 of the charge at the bottom of the page when you say that Question 1 is less complex than with regard to Beatrice because there's dispute only with respect to minor items as to the disposition of the complaint chemicals at the Grace site between these two dates. We don't think that that is accurate at all. We have been willing to state that, yes, there was disposal of chemicals on the site after October of '64, but there is conflicting evidence as to the time and amount, even with regard to TCE, and it's the plaintiffs' burden to show that disposition and the amounts and the timing and, therefore, to show when the TCE would have gotten to the wells.

With regard to perchloroethylene, it's our position that there wasn't even a purchase until '73 or significant use until '74, so your comment that, "There's some question as to the date at which tetrachloroethylene was first used, but even that dispute is within the span of these two dates," suggesting there's nothing material here misses the critical point that it's extremely important when the perc was first used or perhaps disposed of because if it wasn't until 1973, then even under Dr. Pinder's opinion of travel time, perc simply is not in the case. In addition,

even with regard to the TCE, the time of travel and, therefore, the time of disposition is critical.

THE COURT: I didn't say it wasn't, but it's certainly within the span of these two dates, just the same. That's all I've said.

MR. TEMIN: These things are the plaintiff's burden, and just because we have said -- admitted yes, there was something disposed of, it's critical that the plaintiff has to prove them, and they are by no means minor items. They are essential to their case.

THE COURT: If I've said the plaintiff has to prove everything by a preponderance of the evidence once, I've said it a hundred times.

MR. TEMIN: I understand, your Honor, but this is the first question the jury is going to get to. And you've said it's a minor item as to these elements of timing and disposition. We think that really reverses the burden on that part of the first question.

THE COURT: Okay.

MR. TEMIN: Another very important issue as far as we're concerned is this question of whether we should have known that the Wells G and H were there.

THE COURT: Didn't I mention that?

MR. TEMIN: You did. Let me put it in context. We think an essential part of the reasonable

foreseeability of injury question is, as I believe we've made clear, the reasonable foreseeability of thinking that anybody was going to put down wells in this location, from which any groundwater would be drawn.

THE COURT: We don't get into foreseeability after the wells are there.

MR. TEMIN: Well, after the wells are there, it becomes the question -- as part of the question of the existence of a duty of care or breach of a duty of care, should anyone have known.

THE COURT: That's right.

MR. TEMIN: You did deal with this on Page 26, as you said you would. But I think the way you dealt with it really reversed the effect of your comments. What you said, according to my notes, is that in considering whether there was any breach of duty of care, Grace people should have been sufficiently familiar with the area to know that the wells were there.

THE COURT: That's a consideration that was offered.

MR. TEMIN: That's a consideration. And that's the only time in the charge, your Honor, at which you suggested the question, as far as I know, of whether or not anyone should have known whether the wells were there.

Now, the way that comes across is if you

find that the Grace employees should have known that the wells were there after 1964, but didn't, that's another black mark to put against them in your consideration of whether or not they exercised due care. But if they didn't, if it wasn't the case that they should have known that the wells were there, your charge gives no indication to them that if they shouldn't have known that, then they couldn't have reasonably foreseen that anybody could be harmed by these things. It makes it a benefit for the plaintiffs because they can find something against us.

THE COURT: Isn't that a necessary implication from what I've said?

MR. TEMIN: I don't think it is, your Honor. Early on in the charge you talked about -- you selected October 1st, 1964 as the date at which --

THE COURT: I think I keep on talking about the existence of a group, whether a duty exists because there has to be a group. If they don't know there's a well, they don't know there's a group.

MR. TEMIN: You said the group didn't exist until '64.

THE COURT: If they don't know there's a well there, they don't know there's a group there, they don't know there's anybody to be harmed.

MR. TEMIN: That's certainly logical.

THE COURT: I don't think I have to instruct with the obsessive detail of a manual for putting together a gasoline engine.

MR. TEMIN: Let me just mention a couple of reasons why we don't think it's obsessive detail. For one thing, in connection with the question of whether they should have known the wells were there, you mentioned Mr. Riley's statement about general knowledge of the wells. If you were going to mention that, we think you should have mentioned that Mr. Mernin, who was the town engineer since 1972, didn't even know those wells were operating. If the town engineer didn't know that and if you yourself have stated that they would have been put there, then it's hard to see how Grace should have known.

THE COURT: Perhaps I should have at the time mentioned Mr. Mernin. I think they might well have considered Mr. Mernin a total idiot, as a matter of fact.

MR. TEMIN: He was a town engineer. And we think Mr. Riley was close enough --

MR. SCHLICHTMANN: We don't mind the instruction "you may find he's a total idiot."

THE COURT: Mr. Mernin was not an impressive witness.

MR. TEMIN: That's not the question.

THE COURT: I know. I agree that it would

have been better -- it would have been better if I had balanced those two things off. I didn't. I really don't think that it can be done now. I don't think it's worth going back over. If I single that out now, it unbalances it the other way.

MR. TEMIN: What we're asking you, simply, to single out as part of the reasonable foreseeability is the question of whether or not they should have known.

THE COURT: No. All this stuff has got to be taken as a whole. Instructions have to be read as a whole.

Okay. Keep pressing on.

MR. TEMIN: Another question where we don't think that, taken as a whole, the necessary balancing came through is in the question of the definition or understanding of substantial contamination. We think that what essentially didn't come through there was the question of when you consider whether or not our contribution was substantial, you have to take into account the amounts that other contributors were making, so you have to take into account our relative contribution. We don't think that that came in.

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In fact, your charge said it wasn't the Plaintiffs' burden to show that we and Beatrice were the sole contributors. You should have at least said at that point it was not our burden, so we think the correct charge is it is the Plaintiffs' burden to show not in light of all of the evidence in the case which doesn't direct their attention anywhere but in light of other possible contributors and their relative contributions that our contribution is substantial.

You say it is the question of whether we significantly raised the amount. We could raise it from 190 to 200 parts per billion, and they might think 10 ppb is significant. The point is, particularly if we get to the second phase of the case, it is the 190 parts per billion, if there is any adverse effect here, is doing the work we shouldn't as a contributor have 10 parts per billion, neither one charged with this. That is why it is important, the question whether contamination is substantial has to be seen in light of the other sources to which there is evidence, not simply in light of all the evidence in the case.

THE COURT: The other sources -- Go ahead.

MR. TEMIN: Those are the matters that I wanted to single out first because I think they go throughout the charge at different points.

THE COURT: Okay.

MR. TEMIN: Let me now go through and talk about particular items.

On Page 3 you said that, "There can be no reasonably foreseeable risk of harm by reason of the contamination of drinking water unless there exists a group of people likely to drink the water involved." That should be by reason of the contamination of groundwater, since the question is would you foresee you are contaminating the groundwater would harm anyone. The following paragraph brings out my concern.

THE COURT: I think it was much better for you. You focused on drinking water. I suppose somebody could say, well, somebody might wash his hands in it and get the skin irritation as referred to in that letter.

MR. NESSON: Showers, very significant in fact.

MR. TEMIN: It is part of the same assumption that comes through as to the wells. That is the assumption, the jury will think after October 1st, '64, we can assume that the wells were there and people were getting drinking water and that Grace should have known it or would have known it, because then the question is: Is this drinking water that is going to go to people going to harm them? When you say in the following paragraph, "Consequently there was no group of people who the Defendants used reasonable care

with respect to the water to that date, referring to October 1, '64. You are saying as of that date we owed a duty of care to them. But I think the law is we didn't owe a duty of care to any people unless it was reasonably foreseeable that our conduct would cause a risk to them.

THE COURT: Of course, that is what I said. You take this damn thing one sentence at a time. It is really very annoying. I appreciate that you have a duty to call these things to my attention and make a record, but when you don't read the thing all together, it becomes not really a legitimate exercise. Go ahead.

MR. TEMIN: Your Honor, with all respect, the only other place at which the issue of the foreseeability of the existence of the wells came up, was in the existence context I talked to you about. It is not that it is elsewhere and I am taking it out of context. I don't think it goes through at all.

THE COURT: All right, continue on.

MR. TEMIN: We also object to the contrast between the treatment of Beatrice and the treatment of Grace in what you say with regard on Page 4 to the August, 1968 Maher letter that there was no legally sufficient evidence that a reasonable person would foresee consequence of conduct before then. Of course, it is up to your Honor to make the rulings as to directed verdict as you wish. But we think if

the issue is before the jury, the jury ought to be able to decide on the basis of all the evidence without seeing one Defendant treated more favorably than the other. We think there was never any reason for us to foresee that our chemicals were going to get to anyone.

THE COURT: I did it one way in your case and the other way in the Beatrice case, then I have to say, well, there they are up on top of the hill and everybody knows the water runs down the hill, they could look right down in the valley. Do you really want me to do that?

MR. TEMIN: No. What we would like you to do in the question of foreseeability, would anyone have suspected and, therefore, should anybody have known that somebody was going to put wells in that polluted area?

THE COURT: I raised that question.

MR. TEMIN: The next point, your Honor, is on Page 7 in terms of the definition of a preponderance of the evidence. The explanation that you gave leaves it up to the jury, we think, that it can be just a mere matter of probability, 51 percent versus 49 percent. Mr. Nesson's blue bus example. We think---

THE COURT: Where is this?

MR. TEMIN: This is on Page 7.

THE COURT: I was given a blue bus, Page 7?

MR. SCHLICHTMANN: I don't think there is any

bus on Page 7.

MR. TEMIN: "A preponderance of evidence in the case means such evidence as was considered and compared with that opposed to it has more convincing force and produces in your minds belief that what is sought to be proved is more likely true than not true."

THE COURT: That is practically black letter.

MR. TEMIN: I will move on if I won't get anywhere with that one.

THE COURT: You won't.

MR. TEMIN: The following page, Page 8, you talk about the evidence that they will have to consider. There is no mention of the limitations that was put on certain exhibits. Particulary, there were two large exhibits with regard to chemicals on the Grace site that were to be used only for levels and not for the location of the chemicals. One was P-GCSD and the overlays to it.

THE COURT: Did you ask me to do that? Do you have a request in there?

MR. TEMIN: We did not have a specific request in that.

THE COURT: All right.

MR. TEMIN: But you stated -- Certainly, it is our understanding that you were going to indicate the limitations that you were going to put the use---

MR. KEATING: I want to talk about this one for a second.

(Discussion off the record between Keating and Temin.)

THE COURT: I suppose if that is right, if there is a limitation on the exhibit, I'm supposed to say so.

MR. SCHLICHTMANN: When you give them the exhibit.

MR. TEMIN: Do you want to have some indication on the exhibit?

THE COURT: Do you intend to say anything about those exhibits that have been stricken for Beatrice? Mr. Facher's point, do you intend to say some exhibits were stricken and some were not?

MR. SCHLICHTMANN: He said that.

MR. KEATING: No, I'm just asking, Jan, what he itended to do. This might fit in with that.

THE COURT: I suppose where something goes in with a limitation.

MR. SCHLICHTMANN: Which one is it?

MR. TEMIN: P-GCS. Your big one with all the colors.

MR. SCHLICHTMANN: I am just putting in the top third on that.

MR. TEMIN: All right, if it is not going in---

MR. SCHLICHTMANN: You don't have to talk about it.

THE COURT: That is what I thought you were going to do.

MR. SCHLICHTMANN: There is no limitation on that one.

MR. KEATING: Forget it.

MR. SCHLICHTMANN: I destroyed the bottom two thirds, the offending part of that exhibit.

MR. TEMIN: On Page 9---

THE COURT: If I offend, they cut it off.

MR. TEMIN: Page 9, on the bottom there is direct evidence of complaint chemicals in Wells G and H after May 22nd, 1979. You will remember that there is no 1,2, trans-dichloroethylene in Well H before 1979---

THE COURT: Do you want me to instruct about all this in that detail? If I actually ever did what you people would want me to do, do you know how many hours we would be sitting here?

MR. TEMIN: That footprint matter was part of Mr. Keating's argument.

MR. NESSON: Years.

MR. TEMIN: I didn't want them to think you were telling them otherwise, that's all.

Next on Page -- The next one would be on

Page 17, your Honor. Just for the record, I want to point out the part at the bottom about, "The October 1, '64 date being the first time that there was a class of persons to which the Plaintiffs arguably may have owed a duty of due care," and the distinction between Grace and Beatrice. I won't press it because I understand you have already dealt with it.

THE COURT: Yes.

MR. TEMIN: With regard to Page 15 and your addition, I will just add our voice to Mr. Facher's conduct that I think you talked about the post '64 presence of the chemicals as opposed to disposal, which may have resulted from pre '64 disposal and therefore none---

THE COURT: Where did I do that?

MR. TEMIN: Where you added at the end or before the last paragraph you said: "Of course, the contribution to the contamination of the wells, prior to May 22nd, 1979, has to have been disposed of," or I think at some point you said, "or present on the site," and we don't want that confusion. There may not be a serious risk of it.

THE COURT: I don't think there is, given everything else I have said.

MR. TEMIN: On Page 16 is where you instruct with regard to it not being the Plaintiffs' burden to exclude the other sources and just their burden to show we

were not the potent factor. Again, this is something we have been over. We think there should be some questions of the Plaintiffs having to show our relative contribution in light of the others was to make it a substantial factor in causing it. If I lost that argument, I won't press it further now.

On Page 19 in context is the question of the dispute with respect to minor items which I have gone over with regard to -- Page 20 at the top, just for accuracy of the record where you say the experts agree the water flows from an arc westerly and south down to Wells G and H, I think when the wells aren't pumping it is into the river rather than into Wells G and H.

THE COURT: No, no, no.

MR. TEMIN: Some goes to there.

THE COURT: That doesn't really change much when the wells pump.

MR. TEMIN: I won't press it.

THE COURT: It is the natural flow. It just goes a little faster.

MR. TEMIN: If the impetus, your Honor.

MR. KEATING: Restrain it.

THE COURT: What?

MR. TEMIN: On the bottom of Page 21 to follow through with the existence of the wells where you say they had

no duty of care with respect to groundwater to anyone who is not likely to drink from the Woburn wells, I think, again, they are assuming the existence of those wells when you give that instruction in light of what you previously stated.

THE COURT: They have to assume the existence of the wells, all right.

MR. TEMIN: They shouldn't be assuming, as they also are, that we knew about them. It is not part of the Plaintiffs' burden to prove that we should know about them.

It goes on at the top of Page 22 as well.

Let me skip over the regulations for a moment, if I may, except to note that you did say after 1973, and we would like an instruction that anything before they came into effect cannot be evaluated in terms of -- that is, if there is any evidence of negligence, it is only after they became effective.

THE COURT: That is clear enough. I emphasized the point later on in talking about Question 4.

MR. TEMIN: On Page 24, let me repeat on behalf of Grace, Mr. Facher's objection to the instruction with regard to maintenance of a public nuisance.

THE COURT: All right.

MR. TEMIN: The public nuisance, we believe,

is what happens at the wells, not a question of what is happening on your site. We think the combination of the first sentence, permitting a condition on one's land that is likely to interfere with the public right and the public nuisance; and the third,---

THE COURT: I call your attention to the Town of Wareham case where the fire was on the land and the smoke on the highway.

MR. TEMIN: If this is a negligence case, there has to be some sort of unreasonable conduct on our part. We think that is what is left out in that instruction.

Page 25 is where your addition with regard to the gist and the leukemia came up, which I already objected to. Page 26 is the question of the addition you made with regard to knowledge of the wells as to which we've already stated our objection.

On Page 27, we think is an example of a case in which there is a similar sequence of instructions with regard to the stages necessary to find negligence on behalf of Grace. You have done it on behalf of Beatrice and not on behalf of Grace, and we think that differential treatment---

THE COURT: What was that, again?

MR. TEMIN: This is where you stated the things you have to consider.

THE COURT: I did, except I made it more brief.

MR. TEMIN: We don't think the elements were brought out as clearly and as forcibly, and all the elements were brought out with regard to Grace, your Honor, particularly since you read this twice.

MR. KEATING: To Beatrice did you mean to say?

MR. TEMIN: They weren't brought out with regard to Grace as they were brought out with regard to Beatrice.

And that we think -- and I repeat essentially what I had said earlier in a somewhat different form -- that they are not to anticipate anything from the second phase, that they're to decide this on the basis only of what has been shown here and not on the basis of any conjecture of what might or might not be proven.

And also we would press an instruction with regard, in light of the closing argument of plaintiffs' counsel, with regard to this is not a matter of sending a message to corporations.

If I may, your Honor, I'd like your indulgence to let Mr. Cheeseman address the question of regulations just for a moment since he's become the expert on that. It will just take a moment. If there's an objection, I will attempt to do it as well as I can myself.

MR. NESSON: Speaking equitably, I object, since when I tried to do the same you fellows objected; but out of an excess of politeness, go ahead.

MR. CHEESEMAN: Your Honor, Grace objects to your having read each of the three regulations or statutes that you refer to on Page 23 because we believe that none of them applies to Grace's conduct or the circumstances of this case for the reasons that we set forth in our memorandum that we submitted yesterday. The objection extends to the comments at the bottom of Page 22 and the comments at the

top of Page 24 of your proposed instructions that indicate that violation of a regulation is evidence of negligence. And we also object to the reference, briefly, at Page 28 where you indicated that one of the regulations could be taken as giving Grace notice or making foreseeable that the disposal of these materials was disposal of a hazardous material because the definition is not based solely on toxicity. Okay.

MR. TEMIN: This is the second part of the exercise. I will make it as brief as possible. Your Honor, I just want to run through quickly the instructions that we had asked for that have not been granted.

THE COURT: Do it by number.

MR. TEMIN: All right. I will. I trust I won't be waiving any rights if I just do it by number and say virtually nothing.

THE COURT: If you filed the document, I guess you won't.

MR. KEATING: Okay.

MR. TEMIN: On Page 9, Numbers 9, 10, 11, 15, 18, 20, 21, 22, 23, 27, 28, 29, 30, 32, 40, 41, 42, 46, and 48. Many of those are addressed by the arguments we previously made. I trust that my rights will be preserved with regard to anything that I didn't argue specifically about earlier today, if there's no objection to that

procedure.

THE COURT: All right.

Mr. Facher, you have one more?

MR. FACHER: I have just one more. And I'm sorry, your Honor. I wanted to object to the language which I think you added to Page 25 of your probable charge with respect to the example given on foreseeability. And that was the example that you don't have to foresee that the water caused the leukemia. I do think that's an unfortunate example that has one or two strikes implicit in it before the second inning begins, maybe.

THE COURT: I think I specifically said that we don't know what the evidence will be.

MR. SCHLICHTMANN: You said it, Judge.

MR. KEATING: You did say it, but the thing that I heard when you said it was we don't know what the evidence is on leukemia, but there was no sense that there's any doubt that when people got sick, that the causal connection of some sickness was that drinking water and that well water. And that is something that we are going to seriously contest the second -- I'm worrying about this jury walking into the second phase thinking well, I just got to figure out whether it was leukemia that was caused by this.

THE COURT: No, no. We'll get to that when we get there.

MR. KEATING: All right.

THE COURT: Does that complete the catalog?

MR. KEATING: Yes.

THE COURT: I heard you all. I think you've done a very thorough job. I'm not going to change my instructions.

MR. SCHLICHTMANN: Could I just say, because I have said it many times about your comments on evidence, I thought it was quite appropriate because I was the one who was yelling and screaming about it, but I think the way you did it was very fair.

THE COURT: Thank you very much. There is a happy rule that says that the instructions don't have to be perfect. Clearly they're not. And they don't have to cover every issue and aspect of the evidence, and they clearly do not. But having listened to you, I think they're all right, and I'm not going to run the risk of creating some genuine damage by trying to fuss with them now.

Now I'd like to raise with you what I consider to be a real problem; namely, how to deal with the alternate jurors. When Judge Nelson and Judge Keeton had this question and contemplated that jurors would be out for a long time, they segregated the alternate jurors, made them show up every day. On a criminal case, I can see that there was some reason to check them out and make sure they were

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not exposed to outside influences and so forth. I don't really see any reason for that here. One of them comes from some distance, but he's Number 6 and we're not likely to get to him in this deliberation. The first alternate juror is not going to be available Thursday afternoon because of her memorial service for her sister. But my thought would be to let them go on telephone notice.

MR. KEATING: That's fine with us.

MR. NESSON: Would the only point of having them here be quickness in case somebody goes out?

THE COURT: That's about all.

MR. FACHER: What do you expect to say to them about what they're doing in the interim or reading or whatever?

MR. SCHLICHTMANN: Don't accept any phone calls from counsel.

MR. FACHER: Only from you.

THE COURT: This is going to be true during all of August. They're still jurors in this case and they're not to talk. Somebody may try to get to them.

MR. SCHLICHTMANN: Don't go on any TV talk shows.

MR. FACHER: Are you going to ask further about these NOVA things, whether they have done it?

MR. KEATING: There could be more coming down

the pike, too, so maybe some cautionary --

THE COURT: Okay. All right. Okay.

Let's have the jury back down again.

MR. KEATING: I take it -- Jan and Jerry, just for a second. I've always assumed we should be within telephone notice.

THE COURT: Oh, yes.

MR. KEATING: But do you intend to have them come in in the morning and then you send them out to deliberate and then come in in the afternoon and dismiss them?

THE COURT: No.

MR. KEATING: So you're not necessarily expecting us here at particular hours while they're deliberating?

THE COURT: They come in, go directly up to their room. They're not to start deliberating until they all get there.

MR. FACHER: What about questions? Do you tell them they can ask questions?

THE COURT: Yes. I don't encourage them to do it.

MR. FACHER: I don't, either, but I don't know whether they know it.

MR. SCHLICHTMANN: Don't most judges not tell them they can ask questions unless they ask if they can

ask?

THE COURT: I'll tell them. I do tell them don't ask me how to decide this case.

END OF CONFERENCE AT THE BENCH.)

THE COURT: Well, the counsel have gone over what I have said to you and have used their prior suggestions to me, and they have persuaded me that the instructions were not perfect ones and could have been more extensive and in greater detail on a number of subjects, but I am going to leave them just as they are and not add anything more for fear that any improvements would be offset by the possibility of further confusion. The instructions that I have given you are your instructions in this case.

Now, at this point the alternate jurors are excused, but not completely, because at least I have to consider with the volume of evidence in this case deliberations may take some time, I don't know. It may take -- I don't know what time it will take. I have to at least consider the possibility that you will be some fair amount of time, and I have to consider the possibility that during the course of deliberations, one of the regular jurors may become incapacitated for some reason, in which case I will be calling upon the alternate jurors in order to fill in their places. If that happens, then the deliberations have to start all over again, start from scratch, but it is better than a mistrial, in which case we have to start the whole trial from scratch.

So I'm going to say to the alternate jurors, leave your numbers. If you are going to be at any different

numbers than the ones you have already given to the Court, let Mr. Lyons know. Please don't get far away from a number where you can be reached, at least during the ordinary trial day.

Remember that you are still jurors in the case, and this is going to be true for everybody if the case continues -- it depends upon the answers that you give to these questions if it does continue -- you are still jurors in this case until it comes to the final resolution, and you are subject to all of the restrictions that I have placed upon you. So do not let anybody talk to you, do not let anybody -- Do not give any answers to any questions about what is going on in the jury room. Do not let anybody know what your views are, if you have any, about any of the issues in the case. Just stay away from any conversation about the case.

I am told that a public broadcasting, public television service program about this case, which was aired back in February or March, I believe, has been rerun. Be careful you don't let yourselves be exposed to anything like that.

Now, the system, I recognize, has frustrations for the alternate jurors who sit through months and months of testimony and find they are not going to participate in the decision. That is the way the system is designed. I know

you can't do much about it. I thank you for your attention, and I want you to recognize that you nevertheless perform a very useful function. You go forward with confidence over a long trial that even though there is a disability among the jurors, the case can be completed. That is a very important confidence.

I am now going to excuse the alternate jurors. If you have anything upstairs that you want to get, this is the time to get it. Leave your notebooks behind. Turn in your questions. Mr. Lyons, would you please collect the questions and the notebooks.

When the alternate jurors are straightened out, I will excuse the other jurors. I will say -- You go ahead now. Thank you very much. I don't know if I will see you again or not, but if I don't, thank you for your services.

(Whereupon, the alternate jurors left the Courtroom.)

THE COURT: Now, as to the other jurors, it being nearly one o'clock, you now have lunch as guests of the Government. You will proceed in the care of a Deputy Marshall. Once you get to a secure place to have lunch -- the Deputy Marshal will indicate that to you--you may commence your deliberations. Please do not discuss the case, however, as you move through the Courthouse on the elevators and in the

corridors with the Deputy Marshal, do not discuss the case.

When you come back from lunch or sometime thereafter, the items of evidence which have been introduced and are allowed to remain in evidence will be taken up to the jury room, including some of these massive graphic exhibits, and they are for you to consider to the extent that you want. You will have those with you. You will have your notebooks with you, you will have copies of the questions. Remember what I said, I only want one set of questions filled out.

You are permitted to ask questions of me. I don't encourage you to do that. I don't know that I can add anything to what I have already said to you. But if you do have a question, the way that you present it to me is by a writing, which you will give to the Deputy Marshal. He will present it to me, I will discuss the question with counsel, and if it appears appropriate for me to give you an answer, I will do the best I can. Don't ask me how to answer those questions. That is your job. But if you have a particular question -- I hope you won't -- but if you do, that is the way you will proceed. I will deal with it, as I say.

We will just keep on going. I don't intend to keep you late, keep you in the evening or anything of that kind. We will just go from day to day and you work your way

down through the questions and when you come to an end, that will be it.

All right, members of the jury, you are now excused to commence your deliberations in the case. You will be in custody of the Deputy Marshal while you are in deliberations.

(Whereupon, the jury left the Courtroom at 12:52 p.m.)